(1)

Supreme Court, U.S.
FILED

NO. 99- 991551 MAR 20 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,

Petitioner,

v.

LOCKHEED MARTIN CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

WALTER J. LACK
STEVEN C. SHUMAN
ENGSTROM, LIPSCOMB & LACK
10100 Santa Monica Blvd.
Los Angeles, CA 90010
(310) 552-3800

LAURENCE H. TRIBE*
KENNETH CHESEBRO
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

THOMAS V. GIRARDI
JAMES KROPFF
GIRARDI & KEESE
1126 Wilshire Blvd.
Los Angeles, CA 90017
(213) 977-0211

ANDREW W. ZEPEDA
STEVEN L. HOGAN
LURIE & ZEPEDA
9107 Wilshire Blvd.
Beverly Hills, CA 90210
(310) 274-8700

Counsel for Petitioner

*Counsel of Record

March 20, 2000

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

113pp

QUESTIONS PRESENTED

In a suit by petitioner brought against respondent in a California state court, respondent removed the case to federal court on the basis of diversity jurisdiction and obtained a dismissal on the ground that the California statute of limitations had run. Petitioner then brought the present suit against respondent in a state court in Maryland — a state whose relevant statute of limitations had not yet run. Rejecting petitioner's argument that this Court's decisions (especially *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874), and *Hancock National Bank v. Farnum*, 176 U.S. 640, 644-45 (1900)), required the Maryland court to follow California preclusion law (which would not impose a res judicata bar to the Maryland action), the Maryland state courts looked only to federal law and interpreted that law as requiring dismissal of the action on the basis of res judicata. The questions presented are:

1. Is this Court's holding in *Dupasseur* — that the res judicata effect of the judgment of a federal court sitting in diversity "is such as would belong to judgments of the State courts rendered under similar circumstances," and that "no higher sanctity or effect can be claimed," 88 U.S. at 135 — still good law?

2. If *Dupasseur* is overruled or modified by this Court, what should be the res judicata effect of a statute of limitations dismissal in a federal court diversity suit?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Semtek International Incorporated has no parent corporation. No publicly held company owns any of its stock.

TABLE OF CONTENTS

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULE, INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE LOWER COURTS OVER WHAT LAW GOVERNS THE RES JUDICATA EFFECT OF A FEDERAL DIVERSITY JUDGMENT 8

II. IF *DUPASSEUR* IS MODIFIED OR OVERRULED, THIS CASE PRESENTS THE FURTHER QUESTION OF THE APPROPRIATE RULE GOVERNING THE RES JUDICATA EFFECT OF A STATUTE-OF-LIMITATIONS DISMISSAL OF A FEDERAL COURT DIVERSITY CASE 24

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: **PAGE:**

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied and appeal dismissed*, 423 U.S. 908 (1975) 17, 21
Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987) 26
Agostini v. Felton, 521 U.S. 203 (1997) 13
Alcantara v. Boeing Co., 705 P.2d 1222 (Wash. App. 1985) ... 23
American Home Assurance Co. v. International Ins. Co., 641 N.Y.S. 2d 241 (App. 1996) 23
American Motorists Ins. Co. v. General Host Corp., 946 F.2d 1482 (10th Cir.), *vacated in part*, 946 F.2d 1489 (10th Cir. 1991) 20
Andes v. Paden, Welch, Martin & Albano, P.C., 897 S.W.2d 19 (Mo. App. 1995) 23
Answering Service, Inc. v. Egan, 728 F.2d 1500 (D.C. Cir. 1984) 22
Apparel Art International, Inc. v. Amertex Enterprises Ltd., 48 F.3d 576 (1st Cir. 1995) 14
Austin v. Super Valu Stores, Inc., 31 F.3d 615 (8th Cir. 1994) .. 19
Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265 (5th Cir. 1986) 17
Baker v. General Motors Corp., 118 S. Ct. 657 (1998) 3
Bates v. Union Oil Co., 944 F.2d 647 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992) 20
Bauserman v. Blunt, 147 U.S. 647 (1893) 26
Benetton S.p.A v. Benedot, Inc., 642 So.2d 394 (Ala. 1994) ... 23
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 12
Brooks v. The Arlington Hosp. Ass'n, 850 F.2d 191 (4th Cir. 1988) 17
Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) 15
Campbell v. Haverhill, 155 U.S. 610 (1895) 26
Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978) 18
Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343 (2d Cir. 1995) 16

CASES: **PAGE:**

Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498 (11th Cir. 1990) 21
City of Rolling Meadows v. National Adv. Co., 593 N.E.2d 551 (Ill. App. 1991), *cert. denied*, 507 U.S. 960 (1993) 23
Coker v. Basic Media, Ltd., 303 S.E.2d 620 (N.C. App. 1983) .. 24
Collins v. E.I. Dupont de Nemours & Co., 34 F.3d 172 (3d Cir. 1994) 16
Columbia Cas. Co. v. Playtex FP, Inc., 584 A.2d 1214 (Del. 1991) 23
Consolidated Television Cable Serv., Inc., v. City of Frankfort, 857 F.2d. 354 (6th Cir. 1988), *cert. denied*, 489 U.S. 1082 (1989) 18
Davis v. Mills, 194 U.S. 451 (1904) 29
Day v. Volkswagenwerk Aktiengesellschaft, 464 A.2d 1313 (Pa. Super. 1983) 23
DelCostello v. Teamsters, 462 U.S. 151 (1983) 26
Dual & Assocs., Inc. v. Wells, 403 S.E.2d 354 (Va. 1991) 23
Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1874) ... *passim*
Empire Fire & Marine Ins. Co. v. J. Transport, Inc., 880 F.2d 1291 (11th Cir. 1989) 21
Evans v. Cowan, 468 S.E.2d 575 (N.C. App. 1996), *aff'd*, 477 S.E.2d 926 (N.C. 1996) 23
Federal Insurance Co. v. Gates Learjet Corp., 823 F.2d 383 (10th Cir. 1987) 20
Frandsen v. Westinghouse Corp., 46 F.3d 975 (10th Cir. 1995) . 21
Gasbarra v. Park-Ohio Indus., Inc., 655 F.2d 119 (7th Cir. 1981) 18
Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978) 19
Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d. Cir. 1986), *cert. denied*, 480 U.S. 948 (1987) 15
Gibbs v. Air Canada, 810 F.2d 1529 (11th Cir. 1987) 21
Goddard v. Security Title Ins. & Guar. Co., 92 P.2d 804 (Cal. 1939) 5
Gonzales v. Banco Central Corp., 27 F.3d 751 (1st Cir. 1994) . 14
Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 27-28
Hancock National Bank v. Farnum, 176 U.S. 640 (1900) 7, 8
Harborside Refrigerated Servs., Inc. v. Vogel, 959 F.2d 368 (2d Cir. 1992) 15

CASES: **PAGE:**

Harnett v. Billman, 800 F.2d 1308 (4th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) 17
Hart v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468 (11th Cir. 1986) 21
Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294 (1917) ... 28
Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948) 16
Hauser v. Krupp Steel Producers, Inc., 761 F.2d 204 (5th Cir. 1985) 17
Havoco of America, Ltd. v. Freeman, Atkins & Coleman, Ltd., 58 F.3d 303 (7th Cir. 1995) 19
Hayles v. Randall Motor Co., 455 F.2d 169 (10th Cir. 1971) ... 20
Heck v. Humphrey, 512 U.S. 477 (1994) 12
Heiser v. Woodruff, 327 U.S. 726 (1946) 12
Hillary v. Trans World Airlines, Inc., 123 F.3d 1041 (8th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998) 19
Holmberg v. Armbrecht, 327 U.S. 392 (1946) 28
Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983) ... 22
Hyatt v. McBurney, 18 S.C. 199 (S.C. 1882) 23
In re Air Crash at Dallas/Ft. Worth Airport, 861 F.2d 814 (5th Cir. 1988) 17
In re Kaplan, 143 F.3d 807 (3d Cir. 1998) 16
Iowa Elec. Light & Power Co. v. Mobile Aerial Towers, Inc., 723 F.2d 50 (8th Cir. 1983) 19
Johnson v. SCA Disposal Services of New England, Inc., 931 F.2d 970 (1st Cir. 1991) 14
Kent County Bd. of Educ. v. Bilbrough, 309 Md. 487, 525 A.2d 232 (1987) 6, 7
Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) 14-15, 28
Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 26
Koch v. Rodlin Enters., Inc., 223 Cal. App. 3d 1591 (1990) 5
Lackner v. LaCroix, 602 P.2d 393 (Cal. 1979) 5
Lane v. Sullivan, 900 F.2d 1247 (8th Cir.), *cert. denied*, 498 U.S. 847 (1990) 19
Lamontagne v. Board of Trustees of the United Wire, Metal & Mach. Pension Fund, 583 N.Y.S.2d 838 (App. 1992) 23
Lubrizol Corp. v. Exxon Corp., 929 F.2d 960 (3d Cir. 1991) ... 16
Manning v. City of Auburn, 953 F.2d 1355 (11th Cir. 1992) ... 21

CASES: **PAGE:**

Makiriw v. Rinard, 336 F.2d 333 (3d Cir. 1964) 16
McCarty v. First of Georgia Ins. Co., 713 F.2d 609 (10th Cir. 1983) 20
McDonald v. Johnson & Johnson, 776 F.2d 767 (8th Cir. 1985) 19
Metcalf v. City of Watertown, 153 U.S. 671 (1894) 11
Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co., 662 A.2d 536 (N.J. 1995) 24
Morgan v. Inter-Continental Trading Corp., 360 F.2d 853 (7th Cir. 1966) 18
Murphy v. Klein Tools, Inc., 935 F.2d 1127 (10th Cir.), *cert. denied*, 502 U.S. 952 (1991) 20
NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) 21
Palmer v. Lanco Constr., Inc., 665 So.2d 1217 (La. App. 1996) 23
Pardo v. Olson & Sons, Inc., 40 F.3d 1063 (9th Cir. 1994) 20
Pennconn Enters., Inc. v. Huntington, 538 A.2d 673 (Vt. 1987) 23
Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329 (10th Cir. 1988) 20
Pierson Sand & Gravel, Inc. v. Keeler Brass Co., 596 N.W.2d 153 (Mich. 1999) 23
Pilie' & Pilie' v. Graham, 547 So.2d 1305 (La. 1989) 23
Pleming v. Universal-Rundle Corp., 142 F.3d 1354 (11th Cir. 1998) 14, 22
PRC Harris, Inc. v. Boeing Co., 700 F.2d 894 (2d Cir.) 15
Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985) 21
Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 411 F.2d 88 (3d Cir. 1969) 16
Real Estate Exch. Corp. v. Muskegon County Drain Comm'r, 8 N.W.2d 652 (Mich. 1943) 23
RecoverEdge L.P. v. Pentecost, 44 F.3d 1284 (5th Cir. 1995) .. 18
Reimer v. Smith, 663 F.2d 1316 (5th Cir. 1981) 17
Reinke v. Boden, 45 F.3d 166 (7th Cir.), *cert. denied*, 516 U.S. 817 (1995) 18, 29
Robbins v. HNG Oil Co., 878 S.W.2d 351 (Tex. App. 1994) ... 23
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 13

CASES: **PAGE:**

Schieffler v. Financial Servs. Ins. Co.,
39 F.3d 181 (8th Cir. 1994) 19
Schneider v. Lockheed Aircraft Corp.,
658 F.2d 835 (D.C. Cir. 1981) 22
Semler v. Psychiatric Inst. of Washington, D.C., Inc.,
575 F.2d 922 (D.C. Cir. 1978) 22, 27
Semtek Int'l Inc. v. Lockheed Martin Corp., 988 F.
Supp. 913, (D. Md. 1997) 6
Shoup v. Bell & Howell Co., 872 F.2d 1178 (4th Cir. 1989) . 17, 30
Silcox v. United Trucking Serv., Inc.,
687 F.2d 848 (6th Cir. 1982) 18
Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.,
870 F.2d 1044 (5th Cir. 1989) 18, 30
Sun Oil v. Wortman, 486 U.S. 717 (1989) 29
Townsend v. Jemison, 50 U.S. (9 Cranch) 407 (1850) 29
Tucker v. Crikelair, 493 A.2d 247 (Conn. App. 1985) 24
Turner v. Yamaha Motor Corp., U.S.A.,
591 A.2d 886 (Md. App. 1991) 4
UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 26
United States v. Donnally, 33 U.S. (8 Pet.) 361 (1834) 29
United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 26
Venuto v. Witco Corp., 117 F.3d 754 (3d Cir. 1997) 16
Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 26
Wedel v. American Elec. Power Serv. Corp.,
681 N.E.2d 1122, (Ind. App. 1997) 24
Wesch v. Folsom, 6 F.3d 1465 (11th Cir. 1993),
cert. denied, 510 U.S. 1046 (1994) 22
Weston Funding Corp. v. Lafayette Towers, Inc.,
550 F.2d 710 (2d Cir. 1977) 15
Williams v. Ocean Transp. Lines, Inc.,
425 F.2d 1183 (3d Cir. 1970) 16
Wilson v. Garcia, 471 U.S. 261 (1985) 26
Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.,
32 Cal. App. 4th 1511 (1995) 23
Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.),
cert. denied, 377 U.S. 934 (1964) 15

CONSTITUTION, STATUTES AND RULES: **PAGE:**

U.S. Const. art. IV, § 1 10
28 U.S.C. § 1257(a) 1
28 U.S.C. § 1738 ..... 1, 27
Fed. R. Civ. P. 41(b) 2, 27-29
Md. Ct. & Jud. Proc. Code Ann. § 5-101 4

BOOKS:

Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro,
Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) 10, 26
Restatement (Second) of the Conflict of Laws
(1971 & Rev. 1989) 4, 29
Restatement (Second) of the Law of Judgments (1982) 9
18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,
Federal Practice and Procedure (1981) 9, 25-26, 28-29

ARTICLES:

Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*,
71 Cornell L. Rev. 733 (1986) 9-10, 13, 21-22, 26, 29
Ronan E. Degnan, *Federalized Res Judicata*,
85 Yale L.J. 741 (1976) 9-10, 13
Howard M. Erichson, *Interjurisdictional Preclusion*,
96 Mich. L. Rev. 945 (1998) 10, 24
Hon. Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*,
45 Colum. L. Rev. 1 (1945) 14
Graham C. Lilly, *The Symmetry of Preclusion*,
54 Ohio St. L. J. 289 (1993) 9-10, 24
Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 Colum. L. Rev. 1505 (1985) 9

PETITION FOR A WRIT OF CERTIORARI

Semtek International Incorporated ("Semtek") respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland.

OPINIONS BELOW

The decision of the Court of Special Appeals of Maryland is reported at 736 A.2d 1104. *See also* App. 1a-34a. (References to the Appendices to this Petition are styled "App. __a.") The decision of the trial court (App. 36a-47a) is unreported.

JURISDICTION

The Court of Special Appeals of Maryland entered its judgment on September 7, 1999. Semtek filed with the Court of Appeals of Maryland a timely petition for a writ of certiorari, which was denied on December 21, 1999. *See* App. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULE, INVOLVED

The Full Faith and Credit Clause, art. IV, § 1, reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Full Faith and Credit Statute, 28 U.S.C. § 1738, reads in relevant part:

> . . . The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State Territory or Possession from which they are taken.

Fed. R. Civ. P. 41(b) reads:

Rule 41. DISMISSAL OF ACTIONS

* * *

(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

The underlying litigation involves claims of business torts allegedly inflicted on Semtek by respondent Lockheed Martin Corporation ("Lockheed"), none of which arises under federal law. Semtek's first complaint, filed in a California state court and removed by Lockheed to federal court on the basis of diversity of citizenship, was dismissed as untimely under California's two-year statute of limitations. Semtek then refiled in Maryland, where Lockheed has its corporate headquarters and where the case is concededly timely under Maryland's three-year statute of limitations. The law of both California and Maryland treats the California dismissal as merely barring suit under California's two-year statute of limitations, so as to permit the case to go forward in Maryland. Nevertheless, Lockheed won dismissal of the case on the ground that, because the California dismissal was rendered by a federal court sitting in diversity, a federal rule of res judicata purportedly applied, one that the Maryland courts construed as precluding further suit.[1]

[1] The term "res judicata" is sometimes used to refer to the entire subject of the effect of a prior judgment in a subsequent action, and sometimes to refer only to the doctrine of claim preclusion. *See Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998). It is here used in its broader sense, given that the decision below raises the broad question of what law governs the preclusive effect of a federal court diversity judgment. The dismissal of this particular action by the Maryland state courts, however, was based on the doctrine of claim preclusion — specifically, a minority approach to claim preclusion. This approach holds that the dismissal of an action because of the statute of limitations of one jurisdiction bars a subsequent action on the claim, even in a jurisdiction that would allow the action under its own, longer period of limitations. See pp. 29-30 & note 23, *infra*.

Semtek urged the Maryland courts to adhere to this Court's decisions in *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874), and its progeny — decisions that this Court has never overruled or explicitly modified — holding that the res judicata effect of the judgment of a federal court sitting in diversity is defined by the state law of the first forum. The courts below rejected that argument.

Accordingly, this case squarely presents the issue, on which the lower federal and state courts have been in conflict since the 1960s, of whether *Dupasseur* is still good law. If this Court decides to modify or overrule the *Dupasseur* decision, this case presents an excellent vehicle for resolving the uncertainty in the lower courts on a critical question: what is the appropriate federal rule governing the res judicata effect of a statute-of-limitations dismissal issued by a federal court sitting in diversity?

1. Semtek's first lawsuit, filed in California. On February 26, 1997, Semtek filed a business tort suit in California state court against Lockheed and one of its key executives. App. 2a, 60a. Because the executive was a California resident (Complaint ¶ 4), there was no evident basis for removal. However, because defendants' attorneys were provided with a courtesy copy of the complaint prior to service, and because defendants filed removal papers before service on the in-state defendant, Lockheed was able to remove the case to California federal court. App. 61a.

After removal, Lockheed successfully moved for dismissal on the sole basis that Semtek's claims had accrued by August 8,

1994, so that the lawsuit was untimely under California's two-year statute of limitations. App. 49a, 54a-58a, *aff'd*, 1999 U.S. App. LEXIS 3150 (9th Cir. 1999). The California federal court's dismissal was entered on May 8, 1997. App. 59a.[2]

2. Semtek's second lawsuit, filed in Maryland. "During the pendency of the California action, additional investigation by Semtek revealed that much of the alleged tortious conduct occurred in Maryland," App. 37a, where Lockheed is headquartered. App. 4a n.1. On July 2, 1997, Semtek filed suit against Lockheed in Maryland state court. App. 3a, 62a. As Lockheed has not contested, this second lawsuit is timely under Maryland's three-year statute of limitations.[3] Further, California

---

[2] The form of judgment prepared by Lockheed and signed by the California federal district court judge recited that the action was "dismissed in its entirety on the merits and with prejudice." App. 59a. In the Maryland courts, Lockheed argued that this language of its own force barred the Maryland action. In addition to rebutting this argument in its Maryland filings, *see, e.g.*, Brief of Appellant, filed Nov. 30, 1998, at 13-14 & n.6 (citing cases demonstrating that such language is conclusive under neither California nor federal law), Semtek made an unsuccessful effort to amend the California federal court judgment to remove this language from the judgment and hence moot Lockheed's argument. *See* App. 11a-12a. Ultimately, the Maryland appellate court ruled that given its holding that federal law controlled, and its interpretation of federal law, the language cited by Lockheed was "redundant" of what the court believed the judgment would automatically be deemed to mean under federal law even absent the language. App. 21a.

[3] *See* App. 37a, 62a & n.2 (quoting Md. Cts. & Jud. Proc. Code Ann. § 5-101). Unlike other states, Maryland has no borrowing statute (*see generally* Restatement (Second) of the Conflict of Laws § 142(1) & cmt. f (1971); *id.* § 142 & cmt. b (Rev. 1989)) relevant to this case that would adopt the shorter statute of limitations of any other state where any of the causes of action may have arisen. *See Turner v. Yamaha Motor Corp., U.S.A.*, 591 A.2d 886 (Md. App. 1991). Given Maryland law, as Lockheed explicitly acknowledged below, "the timeliness of [Semtek's] suit in Maryland under Maryland's statute of limitations" is "not raised in this case. Lockheed Martin has not sought to dismiss Semtek's Maryland suit on the statute of limitations grounds but on grounds of *res judicata*." Lockheed Martin Corporation's Answer to Petition for Writ of Certiorari, filed Nov. 8, 1999, at 8 n.3 (Md. Ct. App.).

law would permit the second lawsuit to proceed, as California res judicata law follows the majority rule, under which a statute-of-limitations dismissal does not foreclose suit in another forum offering a longer statute of limitations. *See* Restatement (Second) of the Conflict of Laws §§ 142, 143 (1971); *id.* § 142 (Rev. 1989); *see, e.g., Koch v. Rodlin Enters., Inc.*, 223 Cal. App. 3d 1591, 1595-96 (1990). *See also Lackner v. LaCroix*, 602 P.2d 393, 395 (Cal. 1979); *Goddard v. Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806 (Cal. 1939).

Relying on federal law, Lockheed sought to end the Maryland state court action in three ways. First, in the California federal court, Lockheed sought to enjoin Semtek from proceeding with the Maryland action. App. 4a-5a, 60a-72a. The federal court denied this motion, in part because it did "not consider [it] to be obvious that *res judicata* would apply to bar Plaintiff's Maryland state court action." App. 65a.[4]

Second, even though it is a citizen of Maryland and Semtek's complaint alleged only state-law claims, Lockheed sought to remove the lawsuit to the U.S. District Court for the District of Maryland. Lockheed did so on the theory that it possessed a res judicata defense based on the California federal court's statute-of-limitations dismissal, so that the case was

---

[4] *See also* App. 71a n.17 (reiterating that "it is not obvious to this Court that *res judicata* applies to bar Plaintiff's action in Maryland state court," while cautioning that "any dicta or other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of the issues of removal jurisdiction and *res judicata* preclusion."); App. 71a ("This Court's prior order did not reach the substantive merits of Plaintiff's tort claims. If another proper forum will afford Plaintiff the opportunity to fully litigate the merits of its causes of action, without applying a statutory or *res judicata* bar, the Court does not find it appropriate to bar Plaintiff from proceeding in that forum."). The appellate court below quoted this passage in summarizing the California federal court's holding in denying an injunction. App. 4a-5a. But later, in the section of its decision that rejected the California federal court's analysis of the meaning of its own judgment, the appellate court stated that the passage was "inconsequential[]" dicta whose persuasive weight was no greater than that of "cocktail party conversation." App. 10a-11a.

thereby one "arising under" federal law. The Maryland federal court granted Semtek's motion to remand on the ground that removal cannot be predicated on an alleged federal affirmative defense. *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 988 F. Supp. 913, 915-16 (D. Md. 1997); *see also* App. 5a.

Third, on remand, as a last resort Lockheed filed a motion in the Maryland state trial court to dismiss the lawsuit as barred by res judicata. It argued that the preclusive effect of the statute-of-limitations dismissal in California is to be measured by *federal* law, as the dismissal was entered by a *federal* court sitting in diversity — and that the applicable federal rule (supposedly mandated by Fed. R. Civ. P. 41(b)) bars suit anywhere else in the country, even in a forum (such as Maryland) offering a longer limitations period. *See* Motion to Dismiss, filed March 3, 1998. The disposition of this motion forms the basis of Semtek's petition for a writ of certiorari.

3. The Rulings Below on Whether a Federal Rule is Controlling, and on the Content of that Federal Rule. Opposing Lockheed's motion to dismiss, Semtek argued that the res judicata effect of the California federal court's statute-of-limitations dismissal must be measured "by reference to California *res judicata* law," which does not bar litigants from filing suit in another forum with a longer limitations period. Opposition filed March 23, 1998, at 2. Semtek relied both on general principles of full-faith-and-credit jurisprudence, *id.* at 4-6, and on the specific doctrine that the res judicata effect of the judgment of a federal court sitting in diversity is governed by the state law of the first forum, *id.* at 16.

The Maryland trial court agreed with Lockheed. App. 36a-47a. It reasoned that prior Maryland precedent required it to apply federal law to determine the res judicata effect of the California statute-of-limitations dismissal. App. 38a-39a (citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 493, 525

A.2d 232, 235 (1987)).[5] Examining what it considered controlling federal law, it held that "[t]he plain language of" Fed. R. Civ. P. 41(b) "requires that the dismissal of the Plaintiff's California action be deemed an adjudication on the merits" that bars a second suit in any other state. App. 39a.

In the intermediate court of appeals, Semtek urged that the trial court had committed a fundamental error in regarding the res judicata effect of the California diversity judgment as governed by federal rules of preclusion. Semtek invoked a line of cases from this Court starting with *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), for the proposition that the res judicata effect of the judgment of a federal court sitting in diversity is the effect that would be given to the judgment by a state court in the first forum. Brief of Appellant, filed Nov. 30, 1998, at 17-18 (citing *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 645 (1900) (in turn citing *Dupasseur*, 88 U.S. at 135)). Semtek noted that "[t]his holding has never been altered by the Supreme Court" despite several opportunities to do so during the past three decades. *Id.* at 18 & n.10.

In the alternative, Semtek argued that even if federal law did somehow control, the trial court had erred in its construction of federal law as requiring that a statute-of-limitations dismissal under California law in federal court bars suit in any other court under any other law. Under such an analysis, the accident of diversity jurisdiction that permitted Lockheed to remove the case to federal court before obtaining a dismissal would lead to an outcome opposite from what would have attached to a statute-of-limitations dismissal in state court. *Id.* at 21-34.

The intermediate court of appeals rejected both arguments. With only minimal reference to the *Dupasseur* line of cases,

---

[5] Further, the trial court stated that even if it were not bound by the Maryland Court of Appeals' decision in *Kent County Board of Education*, it would reach that result of its own accord based on the analysis set out in the decisions of several federal circuit courts of appeals, and of a Missouri appellate court. *See* App. 40a-46a.

App. 17a-18a (suggesting that *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1900), dealt only with abstract principles concerning "full faith and credit between the states and the federal courts"), it held that precedent from the highest court of Maryland "unambiguously" required it to treat the res judicata issue as one of federal law. App. 7a. Looking to federal law, the appellate court agreed with the trial court that Fed. R. Civ. P. 41(b) is most properly read as giving sweeping preclusive effect to a statute-of-limitations dismissal in a diversity case, even where no such preclusion would attach to a dismissal if the case were handled in state court. App. 8a, 12a-34a. Indeed, the court went so far as to hold that "California state preclusion law" was "utterly immaterial" to the disposition of this case. App. 32a.

Semtek sought discretionary review in the Court of Appeals of Maryland, citing the "venerable line of cases," starting with *Dupasseur*, in which this Court "has held that in a diversity case, the judgment of a federal court on a question of state law has the same, and no greater, effect than as if it had been rendered by a court of the state in which the federal court sits." Petition for a Writ of Certiorari, filed Oct. 21, 1999, at 16 (citing seven cases). Semtek also argued that the sweeping effect given Rule 41(b) by the lower courts had met with substantial criticism by commentators and was inconsistent with leading appellate decisions. *Id.* at 8-12, 17-21. The Court of Appeals denied review. App. 35a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE LOWER COURTS OVER WHAT LAW GOVERNS THE RES JUDICATA EFFECT OF A FEDERAL DIVERSITY JUDGMENT

As commentators have been noting for nearly a quarter century, there exists among the lower courts a deep disagreement about a fundamental question that warrants this Court's review: whether the res judicata effect of a federal diversity judgment is

governed by state or federal law. *See, e.g.*, Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 750-55 & n.49 (1976); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4468, at 654-56, § 4472, at 725-26, 732-36 (1981) ("Wright & Miller"); Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 Colum. L. Rev. 1505, 1505-07, 1514 (1985); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 778-80 (1986); Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L. J. 289, 316-17 & n.101, 319, 322-23 & n.121 (1993); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 989-90, 998, 1005-13 (1998). *See also* Restatement (Second) of the Law of Judgments, § 87, cmt. a (1982) ("the legal basis for recognition of a federal judgment has been a matter of considerable uncertainty"); *id.* § 87, Reporter's Note, cmt. b (stating that "[m]any cases have said flatly that when the federal court sits in diversity jurisdiction, the law of the state where it sits determines the res judicata effects of the federal judgment," and then critiquing this position).

This basic element of the law of res judicata "has been a source of confusion" at least since the 1960s. Degnan, *supra*, 85 Yale L.J. at 764 (citing cases). The confusion should finally be put to rest by a grant of certiorari in this case. As Professor Erichson has recently noted:

> The need for a clear, reliable rule of interjurisdictional preclusion has grown with the phenomenal growth of multiparty, multiforum litigation. The unpredictability of choice of preclusion law and the tendency of many courts unthinkingly to apply their own preclusion law to other courts' judgments highlight the need for a clear rule. At this point, the question should not be whether to have a clear rule, but rather what that rule should be.

96 Mich. L. Rev. at 1015. *See also* Lilly, *supra*, 54 Ohio St. L.J. at 322-23 ("Of course, the need for certainty does not tell us which solution, state or federal, is preferable. What it does suggest is that an authoritative uniform approach should be forged — if not by Congress then by the Supreme Court. Whatever the ultimate solution with respect to the choice-of-law problem, the present uncertainties should not be allowed to linger.").

We briefly sketch this Court's decisions to date on this issue, and then summarize the differing approaches that have been taken by the federal courts of appeals and the state courts.

A. The *Dupasseur* Line of Cases in This Court

With regard to the res judicata effect that must be given the judgments of *state* courts, under the Full Faith and Credit Clause and the statute implementing and extending it, the law has long been clear: the second forum must give the same res judicata effect as would the rendering state court.[6] No similar constitutional or statutory provision addresses the res judicata effect owed the judgments of *federal* courts, so that the rules in this area are ultimately set by this Court.[7]

More than a century ago, this Court articulated a simple rule to be followed with respect to the res judicata effect of the judgment of a federal court sitting in diversity: the judgment has the same effect as if it had been rendered by a state court in the first forum. This rule has never been overruled or explicitly

---

[6] *See* U.S. Const. art. IV, § 1; 28 U.S.C. § 1738; Burbank, *supra*, 71 Cornell L. Rev. at 797-805; Degnan, *supra*, 85 Yale L.J. at 742-44; Erichson, *supra*, 96 Mich. L. Rev. at 983-84, 991-94; Lilly, *supra*, 54 Ohio St. L.J. at 291-93, 301-15.

[7] *See* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1469, 1473-74 (4th ed. 1996); Burbank, *supra*, 71 Cornell L. Rev. 739-47, 753-55, 772-73, 781-83; Degnan, *supra*, 85 Yale L.J. at 744-45; Erichson, *supra*, 96 Mich. L. Rev. 984-89, 1005-08; Lilly, *supra*, 54 Ohio St. L.J. at 315-27.

modified; indeed, in recent decades this Court's res judicata decisions have been crafted so as to avoid altering this basic rule.

In *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), this Court held that the res judicata effect of a federal diversity judgment "is such as would belong to judgments of the State courts rendered under similar circumstances," and that "no higher sanctity or effect can be claimed." *Id.* at 135. Applying this principle, this Court stated that it was not enough that under general common law principles the defendant in the Louisiana state-court litigation under review would not be considered in privity with the defendant who had lost the earlier Louisiana federal court diversity case. Rather, the Court examined "with some care" the nature of Louisiana law concerning privity, *id.* at 135, and only after determining that there was nothing "peculiar in the Louisiana laws" which would support a finding of privity did the Court affirm the finding of the Louisiana courts below that the earlier federal diversity judgment did not bind the defendant in the Louisiana state court suit. *Id.* at 137.

In *Metcalf v. City of Watertown*, 153 U.S. 671, 676 (1894), this Court, in reaffirming *Dupasseur*, stated: "It cannot be doubted that . . . the judgment and decrees of" federal courts sitting in diversity "are entitled to the same sanctity and effect in the courts of each State, when those courts are held within the State, as their own judgments, nothing more, but nothing less."

In *Hancock National Bank v. Farnum*, 176 U.S. 640 (1900), this Court overturned the Rhode Island Supreme Court's attempt to apply its own res judicata law to shield one of its citizens from liability pursuant to a Kansas federal court judgment in a diversity case. In so doing, this Court reiterated again that the effect of the judgment is "not answered by referring to general principles of law . . ., but can be answered only by an examination of the decisions of the courts of Kansas." *Id.* at 643; *see also id.* at 644-45 (noting that "what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered" is the key question to be determined, and "[t]he fact that this judgment was rendered in a court of the

United States, sitting within the State of Kansas, instead of one of the state courts, is immaterial").

By contrast, the Maryland courts below took a quite different view, holding that "California state preclusion law" was "utterly immaterial." App. 32a.

The *Dupasseur* line of cases has been left undisturbed, despite this Court's decisions in several cases in which it might easily have articulated a rule for the res judicata effect of federal court judgments that would have displaced *Dupasseur*. For example, in *Heiser v. Woodruff*, 327 U.S. 726 (1946), involving the res judicata effect of a judgment in a federal question case, the Court carefully stated that it "need not consider whether . . . the rule of *res judicata* applied" in diversity cases "can be other than that of the state in which the federal court sits," *id.* at 731-32, and limited its analysis to reaffirming that "in non-diversity cases . . . the federal courts will apply their own rule of *res judicata*." *Id.* at 733 (citations omitted). In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), the Court reaffirmed its holding in *Heiser*, again making a narrow statement that as to res judicata, "[i]n federal-question cases, the law applied is federal law." *Id.* at 324 n.12. Lending support to the continued vitality of the *Dupasseur* line of cases, this Court noted that "[m]any federal courts, exercising both federal question and diversity jurisdiction, are in accord" in recognizing non-mutual collateral estoppel, "unless in a diversity case *bound to apply a conflicting state rule* requiring mutuality." *Id.* at 325 (emphasis added). *See also Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994) (narrow statement that "[s]tate courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of *federal* law.") (emphasis added).

Even the leading proponent of the view that the res judicata effect of federal court judgments should always be determined by federal law recognizes that this Court has never abandoned the rule set out in the *Dupasseur* line of cases. *See* Degnan, *supra*, 85 Yale L.J. at 770 ("[S]ince *Dupasseur* . . . the Supreme

Court has held that the scope of a federal judgment is determined by the law of the state in which it was rendered, and it has yet to declare that this is no longer the law.").

B. The Conflict and Confusion Among the Federal Circuit Courts of Appeals on This Issue

The lower courts, federal and state alike, operate under an elementary obligation to comply with this Court's past holdings unless and until overruled, even where the foundation of a holding may appear shaky to a lower court. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Nevertheless, the status of the *Dupasseur* line of cases in the federal circuit courts is in flux. As of 1976, the beginnings of a departure from *Dupasseur* existed. *See* Degnan, *supra*, 85 Yale L.J. at 756-60, 764-71. Ten years later, several circuits had at least tentatively adopted a view contrary to the rule set out in *Dupasseur*. These courts held that a uniform federal res judicata rule is to be used to measure the res judicata effect of a diversity judgment. *See* Burbank, *supra*, 71 Cornell L. Rev. at 778-80.

Currently, it appears that only three circuits firmly adhere to the *Dupasseur* rule (the Eighth, Ninth, and D.C. Circuits). Four circuits unambiguously treat the res judicata effect of a diversity judgment as a federal issue (the First, Fourth, Fifth, and Sixth Circuits). The law in the other circuits on this issue is undecided and/or the subject of intracircuit conflicts. (See generally sources cited on p. 9, *supra*.). Even in an ordinary case, such broad and persistent disagreement on an important question of law would warrant this Court's review. When the issue involves the preclusive effect of prior judgments, which necessarily entails relationships among different jurisdictions, such disagreement is intolerable. As matters stand, the same federal court diversity judgment will be given different preclusive effect depending upon the particular jurisdiction in which that judgment becomes a matter of dispute. Certiorari is urgently needed.

We briefly summarize the relevant cases, in chronological order, on a circuit-by-circuit basis.[8]

***First Circuit*: Federal Law Applies.** Although earlier decisions are mixed, in *Johnson v. SCA Disposal Services of New England, Inc.*, 931 F.2d 970, 974 (1st Cir. 1991), the First Circuit adopted "the rule that, in diversity cases, federal law governs the preclusive effect of prior federal judgments." *Gonzales v. Banco Central Corp.*, 27 F.3d 751, 755 (1st Cir. 1994), appeared to suggest that the use of federal res judicata law might be limited to federal question cases. But *Apparel Art International, Inc. v. Amertex Enterprises Ltd.*, 48 F.3d 576, 582 & n.7 (1st Cir. 1995), again articulated a flat rule under which federal res judicata law is applied to all federal court judgments.

***Second Circuit*: No Definitive Ruling.** In *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962), a decision that has been widely cited by other circuits that have adopted a federal rule, the Second Circuit expansively stated that "the effect of a judgment of a federal court" should not be "governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity." *Kern* accorded outcome-determinative preclusive effect to a California federal court's

---

[8] Given this Court's flat holding in *Dupasseur* that state law governs the res judicata effect of a federal judgment in a diversity case, and given the obligation of the lower courts to comply with this Court's holdings until changed, accounting for the current confusion in the lower courts on this issue is difficult. One explanation for the disarray may lie with the context in which full-faith-and-credit issues are typically litigated. As Justice Jackson once noted, the law in this area "depends generally on private advocacy, not always supported by the best research and understanding." Hon. Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 33-34 (1945); *see also id.* at 3 & n.6. For example, the Eleventh Circuit, which suffers from a sharp intracircuit split over the res judicata effect of a diversity judgment, see pp. 21-22, *infra*, set out the issue in a recent decision "in the hope that future litigants will consider and brief the issue." *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356 n.1 (11th Cir. 1998).

dismissal for failure to prosecute, reasoning that "[o]ne of the strongest policies a court can have is that of determining the scope of its own judgments." *Id.* (citing *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958)). Subsequent decisions read *Kern* narrowly, then broadly, then narrowly again.[9] Decisions during the past decade make clear that the Second Circuit is officially undecided on the source of law governing the preclusive effect of a federal diversity judgment.[10]

---

[9] In *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964) (Friendly, J.), the Second Circuit signaled that *Kern* had not definitively resolved this area of the law, observing that because *Zdanok* was a federal question case involving the res judicata effect of judgment in an earlier federal question case, "we are free to follow our own conceptions" concerning res judicata, "and need not decide whether" the same result would be appropriate "if federal jurisdiction in either or both actions rested on diversity alone." *Id.* at 956 (citing *Kern*, 303 F.2d at 340). Similarly, in *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710, 713 & n.3 (2d Cir. 1977), the court noted that it "need not decide whether state or federal law . . . would control the *res judicata* effect of a dismissal by a federal court in a diversity action when the dismissal is based not on a federal rule as it was in *Kern*, but on a state door-closing statute," as there was "no reason to believe" that federal and state law differed on the particular issue in the case at hand.

By contrast, in *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896-97 & n.1 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983), a Second Circuit panel broadly read the *Kern* decision as holding that "the *res judicata* effect that will be given the judgment of a federal court is distinctively a matter of federal law," and relied on this view to hold that a prior statute-of-limitations dismissal barred further suit. More recently, in *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 42 n.3 (2d. Cir. 1986) (Newman, J.), *cert. denied*, 480 U.S. 948 (1987), another panel narrowly read the *Kern* decision, noted that "[f]ederal courts routinely apply state law to determine the preclusive effect of a federal diversity judgment in a subsequent diversity action," and concluded that given the nature of the case, "we need not decide the choice of law issue relative to a federal diversity judgment."

[10] *See Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 373 (2d Cir. 1992) (noting that whether state or federal law "governs the preclusive effect of the judgment of a federal court sitting in diversity on another federal diversity action" is "a legitimate concern," and stating that "we have not definitely decided the issue," but concluding on the facts that "its

***Third Circuit*: No Definitive Ruling.** In early decisions, the Third Circuit adhered, without discussion, to the rule that state law controls the preclusive effect of a federal diversity judgment. *See, e.g.*, *Hartmann v. Time, Inc.*, 166 F.2d 127, 137-38 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948); *Makiriw v. Rinard*, 336 F.2d 333, 334 (3d Cir. 1964); *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*, 411 F.2d 88, 94 (3d Cir. 1969). Then, in a puzzling decision, the court applied federal law to decide the res judicata effect of an earlier diversity court judgment, on the basis that the second lawsuit was a federal question lawsuit. *Williams v. Ocean Transp. Lines, Inc.*, 425 F.2d 1183, 1187-90 (3d Cir. 1970) (criticized in Degnan, *supra*, 85 Yale L.J. at 765-66). During the past decade, however, the Third Circuit has indicated that it has not yet authoritatively decided this issue.[11]

***Fourth Circuit*: Federal Law Applies.** Although earlier decisions are mixed, since 1986 the Fourth Circuit has held that

---

decision must await another day"); *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 n.1 (2d Cir. 1995) (reiterating that "a genuine legal issue exists as to whether federal law or . . . state law governs the *res judicata* effect of a judgment of a federal court sitting in diversity upon a subsequent federal diversity action," and stating that "we have not definitively ruled on this question and decline to do so here because federal law and New York state law both require the same result").

[11] *See Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 962-63 (3d Cir. 1991) (noting "disagreement in the courts of appeal over whether federal or state law of claim preclusion governs in successive diversity actions," but holding that "[w]e need not resolve this issue here, however, because our holding would be the same under both federal and state law"); *Venuto v. Witco Corp.*, 117 F.3d 754, 758 & n.7 (3d Cir. 1997) (declining to decide "whether federal or state res judicata law governs successive diversity actions," as "the same result would be arrived at" under either law, so that question is "still an open one"); *In re Kaplan*, 143 F.3d 807, 814-15 & n.15 (3d Cir. 1998) (stating that "this circuit has not yet decided which preclusion law will apply in the successive-diversity context"). *But see Collins v. E.I. Dupont de Nemours & Co.*, 34 F.3d 172, 176 (3d Cir. 1994) (applying state law of claim and issue preclusion, without discussion of the issue).

federal law generally governs the res judicata effect of a federal diversity judgment. *See Harnett v. Billman*, 800 F.2d 1308, 1312-13 (4th Cir. 1986) (holding that "where the application of *res judicata* rules does not touch upon an important question of state law such as privity, we will apply federal rules of decision to measure the preclusive effect" of an earlier diversity judgment), *cert. denied*, 480 U.S. 932 (1987); *Brooks v. Arlington Hosp. Ass'n*, 850 F.2d 191, 195 (4th Cir. 1988) (reaffirming *Harnett*); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179-80 (4th Cir. 1989) (reaffirming *Harnett* in a case involving the preclusive effect of a statute-of-limitations dismissal, stating that "federal, not state law determines the preclusive effect of a prior federal judgment").

***Fifth Circuit*: Federal Law Applies.** Although earlier decisions are mixed, the Fifth Circuit, in a 1975 decision relied upon by other circuits that have adopted a federal rule, held that in successive diversity cases, "the federal law of res judicata should be applied." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716 (5th Cir.) (critiqued in Degnan, *supra*, 85 Yale L.J. at 766-68), *cert. denied and appeal dismissed*, 423 U.S. 908 (1975). The court reasoned that this Court's *Dupasseur* decision requires only that state law "govern whether a federal court diversity judgment is res judicata in a subsequent state court action." *Id.* at 717-18 & n.9. The Fifth Circuit has consistently applied this principle since *Aerojet-General*.[12]

---

[12] *See, e.g.*, *Reimer v. Smith*, 663 F.2d 1316, 1325 n.9 (5th Cir. 1981) ("When a federal court sitting in diversity is considering the collateral estoppel effect of a prior federal judgment, this circuit applies federal common law.") (citing cases); *Hauser v. Krupp Steel Producers, Inc.*, 761 F.2d 204, 207 (5th Cir. 1985) ("[F]ederal law governs the collateral estoppel effect of an earlier federal judgment, even in diversity cases."); *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269 n.4 (5th Cir. 1986) ("[W]e apply federal law to the question of the *res judicata* or collateral estoppel effect of prior federal court proceedings, regardless of the basis of federal jurisdiction in either the prior or the present action."); *In re Air Crash at Dallas/Ft. Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988) ("Where one federal court is considering the

***Sixth Circuit*: Federal Law Applies**. Although earlier decisions are mixed, in *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 831 (6th Cir. 1978), the Sixth Circuit held that in successive diversity cases, federal law "governs the splitting of a cause of action." Since *Cemer*, the court has applied that approach to the res judicata effect of federal diversity judgments generally. *See Silcox v. United Trucking Serv., Inc.*, 687 F.2d 848, 852 (6th Cir. 1982) (broadly holding that "the scope and effect of a district court judgment in a diversity action is to be determined by federal, not state, law, 'notwithstanding a contrary state rule of *res judicata*'") (quoting *Cemer*, 583 F.2d at 832); *Consolidated Television Cable Serv., Inc., v. City of Frankfort*, 857 F.2d. 354, 357 (6th Cir. 1988) (noting that "the scope of a prior federal court judgment is governed by federal law") (citing *Cemer*), *cert. denied*, 489 U.S. 1082 (1989).

***Seventh Circuit*: No Definitive Ruling**. In two early decisions, the Seventh Circuit applied state law to determine the res judicata effect of an earlier diversity judgment, without discussion of the issue. *See Morgan v. Inter-Continental Trading Corp.*, 360 F.2d 853, 855 (7th Cir. 1966); *Gasbarra v. Park-Ohio Indus., Inc.*, 655 F.2d 119, 121-22 (7th Cir. 1981). In *Reinke v. Boden*, 45 F.3d 166, 170-72 & n.13 (7th Cir.), *cert. denied*, 516 U.S. 817 (1995), the court criticized cases from other circuits that had relied on Fed. R. Civ. P. 41(b) to bar a second suit in successive-diversity situations where the diversity judgment in the first case relied on a statute-of-limitations

---

res judicata [e]ffect of another federal court's judgment in a diversity action, the federal common law of res judicata should be applied"); *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045-46 (5th Cir. 1989) (reiterating that "the effect of a prior federal diversity judgment is controlled by federal rather than state res judicata rules," and applying this principle to bar further litigation of a claim after a statute-of-limitations dismissal in another state); *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1290 & n.11 (5th Cir. 1995) (reaffirming that federal law always determines the preclusive effect of a prior federal judgment).

dismissal. However, in *Havoco of America, Ltd. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303, 307 & n. 7, 308 n.9 (7th Cir. 1995), the court broadly stated, in dicta, that "federal principles of issue preclusion apply when the first judgment is that of a federal court sitting in diversity."

***Eighth Circuit*: State Law Applies**. In early decisions, the Eighth Circuit applied the state law of the rendering forum in deciding the res judicata effect of a federal diversity judgment, with little or no discussion of the issue.[13] During the past decade, the Eighth Circuit has been urged by litigants to adopt the view of other circuits that federal law controls this aspect of res judicata, a request that it has rejected on at least four occasions.[14]

***Ninth Circuit*: State Law Applies**. Although earlier precedent is not entirely clear, at present it appears that the Ninth Circuit follows the traditional rule that "[i]n a subsequent diversity action, . . . the forum state's law applies to determine

---

[13] *See, e.g., Gatzemeyer v. Vogel*, 589 F.2d 360, 362 (8th Cir. 1978) (upholding trial court's use of state law to determine res judicata effect in successive-diversity case); *Iowa Elec. Light & Power Co. v. Mobile Aerial Towers, Inc.*, 723 F.2d 50, 52 (8th Cir. 1983) (holding that the state law of collateral estoppel is to be applied in successive-diversity cases); *McDonald v. Johnson & Johnson*, 776 F.2d 767, 769-70 (8th Cir. 1985) (noting that "res judicata is an issue of substantive law requiring the application of state law in diversity actions").

[14] *See Lane v. Sullivan*, 900 F.2d 1247, 1249-50 (8th Cir.) (noting that "cases from our court have consistently concluded that collateral estoppel in a diversity action is a question of substantive law controlled by state common law), *cert. denied*, 498 U.S. 847 (1990); *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 617-18 (8th Cir. 1994) (reaffirming that "we apply state not federal, law" in determining the "preclusive effect [to be given] to the judgment of another federal court" sitting in diversity); *Schieffler v. Financial Servs. Ins. Co.*, 39 F.3d 181, 186 (8th Cir. 1994) (reiterating that "[r]es judicata is an issue of substantive law requiring the application of state law in diversity actions"); *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043 (8th Cir. 1997) (reaffirming that the res judicata effect of a prior diversity judgment is a matter of state law), *cert. denied*, 522 U.S. 1090 (1998).

the preclusive effect of a previous judgment." *Bates v. Union Oil Co.*, 944 F.2d 647, 649 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992). *See also Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994) ("Because this is a diversity case, we apply the collateral estoppel rules of the forum state.").

***Tenth Circuit*: No Definitive Ruling**. In early decisions, the Tenth Circuit held without discussion of the issue that, in successive-diversity actions, the res judicata effect of the earlier judgment is to be determined by state law. *See Hayles v. Randall Motor Co.*, 455 F.2d 169, 173 (10th Cir. 1971); *McCarty v. First of Georgia Ins. Co.*, 713 F.2d 609, 612-13 (10th Cir. 1983). In *Federal Insurance Co. v. Gates Learjet Corp.*, 823 F.2d 383, 386 & n.1 (10th Cir. 1987), the court adhered to the indication in *Hayles* that "a federal court sitting in diversity applies state law in determining the collateral estoppel effect of a prior federal court diversity judgment," while noting the existence of a circuit split over "whether state law or federal law determines the preclusive effect of a federal court diversity judgment."

A year later, in *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988), the court stated that it had not yet "resolved the question of whether state or federal claim preclusion law governs in successive diversity actions in federal court," and elected to apply federal law "at least insofar as the res judicata issue is not clearly substantive," which the court found was not the case with respect to rules concerning claim-splitting. *Id.* at 1332-33. In *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir.), *cert. denied*, 502 U.S. 952 (1991), the court applied federal law to determine the preclusive effect of a statute-of-limitations dismissal in an earlier diversity action. Based on its most recent decisions, however, it appears that the Tenth Circuit is officially undecided on this issue.[15]

---

[15] *See American Motorists Ins. Co. v. General Host Corp.*, 946 F.2d 1482, 1485-86 (10th Cir.), *vacated in part*, 946 F.2d 1489 (10th Cir. 1991) (noting that "there appears to be some doubt within the Tenth Circuit as to whether federal or state rules of collateral estoppel, i.e., issue preclusion, apply in successive diversity actions," but concluding that the point need not be decided in the appeal); *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 977-78 (10th Cir. 1995) (noting that "[t]here is some confusion in this circuit as to whether federal or state rules should apply," but ruling that resolution of the issue was not necessary to the decision of the appeal).

***Eleventh Circuit*: No Definitive Ruling**. Shortly after its creation, the Eleventh Circuit relied on the Fifth Circuit's sweeping *Aerojet-General* decision to hold that "[w]hen a federal court sitting in diversity examines the collateral estoppel or res judicata effect of a prior federal judgment, based either on diversity or a federal question, it must apply federal common law." *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1503 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985) (criticized in Burbank, *supra*, 71 Cornell L. Rev. at 779 & n.218). During the next six years, the court followed this broad holding on at least four occasions.[16]

The court abruptly shifted course in *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990), where it held that "[f]ederal courts apply the law of the state in which they sit with respect to the doctrine of res judicata." *Id.* at 1560. *See also Manning v. City*

---

[16] *See Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986) ("Although both actions were based on state law and originally brought in state court, we apply federal common law because we are determining the preclusive effect of a federal judgment."); *Gibbs v. Air Canada*, 810 F.2d 1529, 1535 (11th Cir. 1987) ("Federal law governs the res judicata effect of a prior judgment in a diversity action in a subsequent diversity case."); *Empire Fire & Marine Ins. Co. v. J. Transport, Inc.*, 880 F.2d 1291, 1293 n.2 (11th Cir. 1989) ("Although there are still some cases that say that when the federal court is exercising its diversity jurisdiction, the law of the state where it sits determines the preclusive effect of its judgment, this view is erroneous.") (citation omitted); *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 & n.4 (11th Cir. 1990) (stating that "even in a case which rests its subject matter jurisdiction solely upon diversity of citizenship, a federal court must apply federal law to determine the preclusive effect of a prior federal court decision," while noting "that questions have been raised as to the wisdom of an absolute rule" under which federal law always applies).

of Auburn, 953 F.2d 1355, 1358 (11th Cir. 1992) (holding that "[f]ederal courts apply state law to questions of res judicata," relying on *NAACP v. Hunt*); *Wesch v. Folsom*, 6 F.3d 1465, 1471 (11th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994) (same). The Eleventh Circuit recently noted that on the issue of "whether state or federal principles of res judicata apply," its decisions "appear to lead in two different directions," but declined to resolve the issue and called on litigants to "consider and brief the issue" in future cases. *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356 n.1 (11th Cir. 1998).

***D.C. Circuit*: State Law Applies**. In its first substantial discussion of the issue, the D.C. Circuit, in a case involving the rule governing claim-splitting in successive diversity cases, held that *Erie* and Full Faith and Credit principles "require a federal court exercising diversity jurisdiction in forum II to give the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, *at least* in the absence of an overriding federal interest." *Semler v. Psychiatric Inst. of Washington, D.C., Inc.*, 575 F.2d 922, 927-28 (D.C. Cir. 1978). *Semler* was reaffirmed in *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981), in which the court agreed with Lockheed (respondent here) that "a federal court sitting in diversity must look to local law to determine whether collateral estoppel may be employed." *Id.* at 851 & n.17.

The court appeared to depart from *Semler* in *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1496 (D.C. Cir. 1983), a case giving res judicata effect to a federal diversity judgment pending appeal, in which the court suggested that it was "join[ing] the burgeoning majority of federal courts" applying a federal law of res judicata. But in *Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1505-06 (D.C. Cir. 1984), it reaffirmed the *Semler* rule "that, in diversity actions, state res judicata rules govern absent some overriding federal interest," and harmonized the result in

Hunt as consistent with an *Erie* rule requiring the use of all state res judicata law "that can be characterized as substantive."

***Federal Circuit*: No Rulings**. Petitioner has located no pertinent cases from the Federal Circuit. *See also* Burbank, *supra*, 71 Cornell L. Rev. at 780 n.223.

C. The Conflict and Confusion Among the State Courts on This Issue

Serious conflict and confusion over the res judicata effect of federal diversity judgments is also apparent in the state courts. Although a handful of states appear to be in accord with Maryland in applying federal law,[17] the majority rule among the states is that state law applies.[18] Further adding to the conflict and confusion is that some state courts, and even some federal district courts, have held that the res judicata effect of a federal

---

[17] *See, e.g., Pilie' & Pilie' v. Graham*, 547 So.2d 1305, 1306, 1308-09 (La. 1989); *Palmer v. Lanco Constr., Inc.*, 665 So.2d 1217, 1220 (La. App. 1996); *Pierson Sand & Gravel, Inc. v. Keeler Brass Co.*, 596 N.W.2d 153, 156 n.8 (Mich. 1999) (dictum); *Andes v. Paden, Welch, Martin & Albano, P.C.*, 897 S.W.2d 19, 21 (Mo. App. 1995); *Robbins v. HNG Oil Co.*, 878 S.W.2d 351, 357, 361-62 (Tex. App. 1994); *Alcantara v. Boeing Co.*, 705 P.2d 1222, 1225 (Wash. App. 1985).

[18] *See, e.g., Benetton S.p.A v. Benedot, Inc.*, 642 So.2d 394, 399 (Ala. 1994); *Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.*, 32 Cal. App. 4th 1511, 1516-17 (1995); *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217-19 (Del. 1991) (analyzed in Erichson, *supra*, 96 Mich. L. Rev. at 968-69); *City of Rolling Meadows v. National Adv. Co.*, 593 N.E.2d 551, 556 (Ill. App. 1991), *cert. denied*, 507 U.S. 960 (1993); *Real Estate Exch. Corp. v. Harte*, 8 N.W.2d 652, 657 (Mich. 1943) (citing *Dupasseur*); *Lamontagne v. Board of Trustees of the United Wire, Metal & Mach. Pension Fund*, 583 N.Y.S.2d 838, 840 (App. 1992); *American Home Assurance Co. v. International Ins. Co.*, 641 N.Y.S.2d 241, 243 (App. 1996); *Evans v. Cowan*, 468 S.E.2d 575, 577 (N.C. App. 1996), *aff'd*, 477 S.E.2d 926 (N.C. 1996); *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1316-17 (Pa. Super. 1983); *Hyatt v. McBurney*, 18 S.C. 199, 208 (S.C. 1882) (citing *Dupasseur*); *Pennconn Enters., Inc. v. Huntington*, 538 A.2d 675, 678 (Vt. 1987); *Dual & Assocs., Inc. v. Wells*, 403 S.E.2d 354, 356 (Va. 1991).

diversity judgment is not determined by the state law of the *first* forum, but rather by the state law of the *second* forum.[19]

A grant of certiorari is urgently needed to end the enormous conflict and confusion among the federal and state courts over the fundamental issue of what source of law controls the res judicata effect of a federal diversity judgment. The meaning of a federal judgment should not vary depending upon the particular jurisdiction in which that judgment becomes a matter of dispute.

II. IF *DUPASSEUR* IS MODIFIED OR OVERRULED, THIS CASE PRESENTS THE FURTHER QUESTION OF THE APPROPRIATE RULE GOVERNING THE RES JUDICATA EFFECT OF A STATUTE-OF-LIMITATIONS DISMISSAL OF A FEDERAL COURT DIVERSITY CASE

If on plenary review the Court were to answer the first question by reaffirming in full *Dupasseur* and its progeny — so that the res judicata effect attached to a federal diversity judgment is precisely the effect that would attach to a judgment of the forum state, no more and no less — then this Court's work would be at an end. If Semtek's California suit had remained in state court instead of being removed to federal court, the *sole* res judicata effect that would have attached to a statute-of-limitations dismissal would have been that it was too late to sue under

---

[19] *See* Erichson, *supra*, 96 Mich. L. Rev. at 998 (citing cases); Lilly, *supra*, 54 Ohio St. L.J. at 321-22 & n.117 (citing cases). *See also Tucker v. Crikelair*, 493 A.2d 247, 247-48 (Conn. App. 1985) (applying Connecticut law to determine the res judicata effect of a California federal court's statute-of-limitations dismissal); *Wedel v. American Elec. Power Serv. Corp.*, 681 N.E.2d 1122, 1131 (Ind. App. 1997) (applying Indiana law to determine the res judicata effect of the judgment of a Kentucky federal court sitting in diversity); *Mortgageling Corp. v. Commonwealth Land Title Ins. Co.*, 662 A.2d 536, 539-42 (N.J. 1995) (applying New Jersey law to determine the res judicata effect of the judgment of a Pennsylvania federal court sitting in diversity); *Coker v. Basic Media, Ltd.*, 303 S.E.2d 620, 621-22 (N.C. App. 1983) (applying North Carolina law to determine the res judicata effect of a D.C. federal district court's statute-of-limitations dismissal).

California's two-year statute, as Lockheed did not dispute below. In other words, the ruling would have had only an *issue* preclusive effect concerning California's limitations period; it would not have had any *claim* preclusive effect that could bar the Maryland action, which would be subject to Maryland's longer limitations period. California follows the traditional rule "that dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations." 18 Wright & Miller, *supra*, § 4441, at 369. See pp. 4-5, *supra* (citing cases). Thus, if *Dupasseur* is still good law, so that the res judicata effect of a limitations dismissal in federal court is exactly the same as in state court, then it is clear that the California dismissal does not preclude Semtek's Maryland lawsuit.

If this Court were instead to modify or even overrule the *Dupasseur* line of cases, this case would then provide a vehicle for resolving what rule of federal law should govern the res judicata effect of a statute-of-limitations dismissal issued by a federal court sitting in diversity — allowing this Court to set forth by example, in concrete terms, the manner in which post-*Dupasseur* analysis of res judicata questions is to be carried out.

At least three options would then appear to be open to the Court in articulating the content of the federal rule governing statute-of-limitations dismissals in diversity cases.

First, this Court might rule that, although the res judicata effect of a diversity judgment is governed by federal law, there is no important federal interest in dictating the use of a nationally uniform rule governing the effect of a statute-of-limitations dismissal. Instead, as the Court has done on other issues involving federal litigation of state-law claims where no statute or rule is explicitly controlling, the Court could hold that the federal common law rule here is one that *borrows* the pertinent state-law res judicata rule that would have applied if the case had

been brought in, or had remained in, state court.[20] Such an approach would reflect the philosophy that "although federal law must ultimately control the choice, federal law should at times apply state preclusion rules to federal judgments on state questions. This is the position adopted by the Restatement Second of Judgments." 18 Wright & Miller, *supra*, § 4472, at 734 (citing 1 Restatement (Second) of Judgments § 87 (1982)).

Such an approach would retain much of the practical value of the *Dupasseur* rule in preventing the accident of a federal forum from leading to a markedly different result than would have obtained in state court. In so doing, this approach would help promote the principles underlying this Court's *Erie* jurisprudence, carrying out the strong federal interest in preventing the inequitable administration of the laws and in minimizing opportunities for outcome-determinative forum-shopping.[21] As Judge Wilkey put this point, in a decision that

---

[20] *See generally* Fallon, Meltzer & Shapiro, *supra* note 7, at 820-29; *see also* Burbank, *supra*, 71 Cornell L. Rev. 796 & n.314 (citing as examples *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). Of particular relevance here, in defining the applicable statute of limitations on federal-law claims where Congress has not addressed the matter, this Court has generally directed the use of the statute-of-limitations law of the forum state where compatible with federal interests, despite the substantial variations between fora that are the consequence of such borrowing. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146-48 (1987); *id.* at 157-65 (Scalia, J., concurring in the judgment); *Wilson v. Garcia*, 471 U.S. 261, 266-71 (1985); *DelCostello v. Teamsters*, 462 U.S. 151, 158-62 (1983); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966); *Campbell v. Haverhill*, 155 U.S. 610, 614-15 (1895); *Bauserman v. Blunt*, 147 U.S. 647, 652-53 (1893); *see also* Burbank, *supra*, 71 Cornell L. Rev. at 768-69 & n.164. The borrowing of state law as federal common law is, of course, hardly confined to the context of federal diversity litigation. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29 (1979).

[21] That concern is well illustrated by the facts of this case. The holding below that Semtek's second lawsuit is barred under a federal rule of res judicata is the product of two forum choices, neither of which, we submit, should have any bearing on the result in this case. First, because Semtek

remains the leading D.C. Circuit case on the res judicata effect of a diversity judgment:

> [T]he principles of *Erie* . . . and the mandate of the Full Faith and Credit Clause as supplemented by 28 U.S.C. § 1738 require a federal court exercising diversity jurisdiction in forum II to give to the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, *at least* in the absence of an overriding federal interest.

Semler v. Psychiatric Inst. of Washington, D.C., Inc., 575 F.2d 922, 927-98 & n.33 (D.C. Cir, 1978) (citation omitted).

There would appear to be no basis for applying a uniform federal rule to determine the res judicata effect of a statute-of-limitations dismissal in a diversity case. The jurisdictional statutes that enabled Lockheed to obtain access to California federal court were designed to afford "out-of-State litigants another tribunal, not another body of law," and "[t]he source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the States." *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945). Thus, in the specific context of

---

provided defendants with a courtesy copy of the complaint prior to service, Lockheed and the in-state defendant were able to remove the case to federal court. See p. 3, *supra*. This change of forum later allowed Lockheed to argue to the Maryland courts that they must use a federal res judicata rule to preclude the second suit, a result that would not have been possible if the first case had been dismissed in California state court.

Second, instead of filing the second lawsuit in Delaware (Lockheed's state of incorporation), whose state courts have rejected the use of a federal res judicata rule, see note 18, *supra*, and where the statute had not run, Semtek filed in Maryland (where Lockheed has its headquarters and where much of the alleged wrongdoing occurred). This choice of forum led to the dismissal of Semtek's action on the basis of the sweeping res judicata effect of a statute-of-limitations dismissal adopted by the Maryland courts in significant part as a result of their interpretation of Fed. R. Civ. P. 41(b) — an interpretation that is, we submit, mistaken. *See* note 22, *infra*, and authorities cited therein.

the statute-of-limitations rules applicable in federal diversity litigation, this Court has emphasized that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court." *Id.* at 109. *See also Holmberg v. Armbrecht*, 327 U.S. 392, 394 (1946) (reaffirming *York*, noting that "a statute of limitation is a significant part of the legal rules which determine the outcome of a litigation"). Likewise, this Court has noted that the "doctrine of *res judicata* is not a mere matter of practice or procedure," but rather "a rule of fundamental and substantial justice." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

By contrast, there may be an overriding federal interest in giving a uniform res judicata effect to judgments where necessary to regulate litigant conduct under the Federal Rules of Civil Procedure, thereby arguably obliging state courts "to honor preclusion rules that draw not from adjudication but from procedural penalties." 18 Wright & Miller, *supra*, § 4468, at 658. Examples might include the "failure to assert a compulsory counterclaim" under Rule 13(a), and "dismissals for failure to prosecute or to comply with court orders or rules," for example, under Rule 41(b). *Id.*[22]

---

[22] This concern has been articulated most prominently by the Second Circuit in its oft-cited decision in *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962), which barred a litigant from proceeding with a second suit in New York federal court after suffering a Rule 41(b) dismissal for failure to prosecute in California federal court. The particular, and limited context of failure to prosecute that triggered *Kern*'s sweeping language on the strong federal interest in precluding suit in such an instance was later overlooked by some Second Circuit panels. See p. 15 & note 9, *supra*.

Some commentators have questioned the view that the Federal Rules of Civil Procedure in general, and Rule 41(b) in particular, may or should be construed as broadly dictating the preclusive effect of federal judgments and have suggested that the Rules Enabling Act (coupled with the constitutional principles underlying the *Erie* decision) may present a barrier to any such broad construction. *See* 18 Wright & Miller, *supra*, § 4441, at 366 (stating that Rule 41(b) is "clearly inapposite" to the preclusive effect of a statute-of-limitations dismissal); *id.* § 4468, at 658-59; *id.* § 4472, at 732-39; Burbank, *supra*, 71 Cornell L. Rev. at 772-75, 780-83, 791-97; Lilly, *supra*, 54 Ohio St. L.J. at 319-21 & n.113. *See also Reinke v. Boden*, 45 F.3d 166, 170-71 & n.13 (7th Cir.) (noting the "serious criticism" of the line of cases relying on the last sentence of Rule 41(b) to hold that "when successive actions are brought in different federal courts, a determination by the first federal court that the cause of action is barred by the statute of limitations of one state bars a successive action in a second federal court — even though that second court would apply a different statute of limitations, the statute of the state in which it sits."), *cert. denied*, 516 U.S. 817 (1995).

A second option available to the Court would be simply to adopt, as a uniform federal rule governing the res judicata effect of a statute-of-limitations dismissal, the traditional rule that such a dismissal does not preclude suit in another forum with a longer limitations period (at least so long as the rule of the rendering jurisdiction bars only a remedy in that jurisdiction's courts, and not the right itself). See pp. 4-5, 24-25, *supra*.[23]

A third option available to this Court — and, we submit, the least desirable — would be to adopt, again as a uniform federal rule, the opposite rule: the minority rule that a statute-of-limitations dismissal in the initial forum bars another suit in any

---

[23] The leading federal court opinion articulating the traditional rule that each forum may apply its own limitations period in deciding the timeliness of an action is Justice Story's opinion in *United States v. Donnally*, 33 U.S. (8 Pet.) 361, 370, 372-73 (1834). *See* 18 Wright & Miller, *supra*, § 4441, at 369 n.9. *See also Townsend v. Jemison*, 50 U.S. (9 Cranch) 407, 413 (1850) ("The rule in the courts of the United States, in respect to pleas of the statutes of limitation has always been, that they strictly affect the remedy, and not the merits."); *Davis v. Mills*, 194 U.S. 451, 453 (1904) ("[T]he ordinary limitations of actions are treated as laws of procedure and as belonging to the lex fori, as affecting the remedy only and not the right.").

This rule has produced "the general conclusion that dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations." 18 Wright & Miller, *supra*, § 4441, at 369. This Court reaffirmed the constitutionality of this traditional choice-of-law approach in *Sun Oil v. Wortman*, 486 U.S. 717 (1989). This is the rule adopted in the Restatement (Second) of the Conflict of Laws § 142(2) & cmt. g, § 143, and it appears to be the majority rule. *But see id.* § 142 & cmts. e & g (Rev. 1989) (noting recent decisions departing from the "right" versus "remedy" analysis).

other forum. This is the rule that was adopted by the Maryland courts below, and in doing so, they followed the reasoning of several courts that have interpreted Fed. R. Civ. P. 41(b) to require such a result. *See* App. 8a, 12a-16a, 19a-25a (principally relying on *Shoup v. Bell & Howell*, 872 F.2d 1178 (4th Cir. 1989), and *Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044 (5th Cir. 1989)). The idea that Rule 41(b) by its terms dictates any particular preclusive effect has received substantial criticism. *See* note 22, *supra*, and authorities cited therein.

In sum, if this Court elects on the merits to modify or overrule its holdings in *Dupasseur* and its progeny, this case provides a perfect vehicle for explicating, for the benefit of the lower federal and state courts, the post-*Dupasseur* approach to be taken in analyzing the various res judicata issues that are relevant to judgments in diversity cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER J. LACK
STEVEN C. SHUMAN
ENGSTROM, LIPSCOMB & LACK
10100 Santa Monica Blvd.
Los Angeles, CA 90010
(310) 552-3800

LAURENCE H. TRIBE*
KENNETH CHESEBRO
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

THOMAS V. GIRARDI
JAMES KROPFF
GIRARDI & KEESE
1126 Wilshire Blvd.
Los Angeles, CA 90017
(213) 977-0211

ANDREW W. ZEPEDA
STEVEN L. HOGAN
LURIE & ZEPEDA
9107 Wilshire Blvd.
Beverly Hills, CA 90210
(310) 274-8700

Counsel for Petitioner

* *Counsel of Record*

TABLE OF APPENDICES

APPENDIX A

Decision of the Court of Special Appeals of Maryland, dated September 7, 1999 ..... 1a

APPENDIX B

Order of the Court of Appeals of Maryland denying certiorari, dated December 21, 1999 ..... 35a

APPENDIX C

Memorandum Opinion of the Circuit Court for Baltimore City, dated April 30, 1998, granting defendant's motion to dismiss 36a

APPENDIX D

Order of the U.S. District Court for the Central District of California, dated May 5, 1997, granting defendants' motion to dismiss, and judgment dated May 8, 1997 ..... 48a

APPENDIX E

Order of the U.S. District Court for the Central District of California, dated August 11, 1997, denying Lockheed's motion for injunction 60a

APPENDIX A

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1041
September Term, 1998

SEMTEK INTERNATIONAL INCORPORATED

v.

LOCKHEED MARTIN CORPORATION

Moylan,
Adkins,
Bloom, Theodore R. (Ret., Specially Assigned),

JJ.

OPINION BY MOYLAN, J.

Filed: September 7, 1999

[Page numbering from 736 A.2d 1104 in bold]

[1106] Semtek International Corp. ("Semtek"), the appellant, challenges an Order issued by Judge Joseph H. H. Kaplan in the Circuit Court for Baltimore City, whereby Semtek's Complaint against Lockheed Martin Corporation ("Lockheed"), the appellee, was dismissed on grounds of *res*

judicata. On appeal, Semtek raises the sole issue of whether the trial court erred in dismissing the Complaint. Although Semtek has strained, at least before us if not necessarily before Judge Kaplan, to inject all sorts of peripheral doctrines and issues into the case, the question before us, in essence, is the single issue of

> whether Judge Kaplan was entitled to give preclusive effect to the judgment of a federal district court dismissing Semtek's suit against Lockheed, stating as it did so that the suit was being "dismissed in its entirety on the merits."

Procedural Background

A. *California State Suit Removed to Federal District Court on Ground of Diversity*:

On February 26, 1997, Semtek filed a Complaint against Lockheed in the Superior Court for Los Angeles (hereinafter "the California action"), alleging (1) breach of contract, (2) intentional interference with prospective economic advantage, (3) negligent interference with prospective economic advantage, and (4) civil conspiracy, in relation to Semtek's joint venture with a Russian company for the use of former military satellites for commercial purposes. Lockheed immediately removed the action to the United States District Court for the Central District of California (hereinafter "California District Court") based on diversity of citizenship.

B. *District Court Dismissed Suit and Dismissal Affirmed by Ninth Circuit*:

In the California District Court, Lockheed moved to dismiss Semtek's Complaint based on the expiration of California's two-year Statute of Limitations. On May 8, 1997, the California District Court granted Lockheed's motion and

dismissed the action with prejudice, holding that the causes of action had accrued in August of 1994, thus making the February 26, 1997 Complaint untimely. Three days later, the following Order was issued:

> IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Semtek International Incorporated take nothing on its complaint in this action, that *the action be dismissed in its entirety on the merits* and with prejudice, and that this Judgment be entered forthwith in favor of defendants Lockheed Martin . . . .

(Emphasis supplied).

Semtek appealed that judgment to the United States Court of Appeals for the Ninth Circuit. On February 25, 1999, the Ninth Circuit affirmed the California District Court's dismissal of Semtek's Complaint on Statute of Limitations grounds. *Semtek Internat'l Inc. v. Lockheed Martin Corp.*, No. CV-97-55840, 1999 WL 97355 (9th Cir. Feb. 25, 1999).

C. *Refiling of Suit in Maryland State Court*:

On July 2, 1997, Semtek filed in Maryland another Complaint against Lockheed (hereinafter "the Maryland action"), alleging (1) breach of contract, (2) intentional interference with prospective economic advantage, (3) negligent interference with prospective economic advantage, and (4) civil conspiracy, based on the same purported joint venture between Semtek and a Russian company regarding the use of military satellites. That suit was filed in the Circuit Court for Baltimore City, making the underlying claim subject to Maryland's three-year Statute of Limitations **[1107]** rather than California's two-year Statute of Limitations.

D. *Failed Injunction Attempt in Original Federal District Court*:

In response, Lockheed filed an All Writs Act injunction in the California District Court on July 23, 1997. Lockheed asserted that Semtek was barred from bringing suit in Maryland on the grounds of *res judicata*. Two days later, Lockheed removed the Maryland action to the United States District Court for the District of Maryland (hereinafter "Maryland District Court"), citing the involvement of a federal question as grounds for removal.[1] Specifically, Lockheed maintained that, even though none of Semtek's claims presented a federal question, Lockheed planned to assert the defense of *res judicata* based on the California Federal Court's ruling, thus presenting a federal question for resolution.

Ultimately, the California District Court denied Lockheed's injunctive efforts, holding as follows:

> [T]his Court is not convinced that the single action filed by [Semtek] in Maryland rises to the level of vexatious relitigation which would warrant the use of the rather extreme remedy that Lockheed requests. [Semtek] has not filed subsequent actions that are either "numerous" or "patently without merit." The Court does not view this chronology as one in which the Court is justified in summarily precluding [Semtek's] access to the courts. This Court's prior order did not reach the substantive merits of [Semtek's] tort claims. If another proper forum will afford [Semtek] the opportunity to fully litigate the merits of its causes of action,

[1] Lockheed could not remove the action based on diversity of citizenship because Lockheed is considered a Maryland citizen.

> without applying a statutory or *res judicata* bar, the Court does not find it appropriate to bar [Semtek] from proceeding in that forum.

(Citation omitted).

E. *Removal From Local Federal District Court to Maryland State Court*:

After the California District Court's ruling, Lockheed filed a Motion to Dismiss the Maryland action in the Maryland District Court on grounds of *res judicata*. Semtek, on the other hand, sought to have the Maryland District Court remand the action to the Circuit Court for Baltimore City, alleging lack of subject matter jurisdiction in the Maryland District Court. On December 31, 1997, the Maryland District Court granted Semtek's motion to remand the case to the circuit court on the ground that federal removal could not be predicated on an alleged federal affirmative defense. *Semtek Internat'l, Inc. v. Lockheed Martin Corp.*, 988 F. Supp. 913 (D. Md. 1997). The Maryland District Court did not rule on Lockheed's Motion to Dismiss.

The *Res Judicata* Ruling

Thereafter, Lockheed filed another Motion to Dismiss in the Circuit Court for Baltimore City, again asserting that the suit was barred by *res judicata*. A hearing was held on April 23, and on April 30, 1998, the trial court granted Lockheed's Motion to Dismiss. The thorough and well-researched opinion of Judge Kaplan explained:

> The central issue that this court has been asked to consider is the preclusive effect of a federal dismissal on a subsequent identical state court action . . . . Pursuant to the clear language of the Federal Rules of Civil

Procedure and federal preclusion law, federal law determines the preclusive effect of a prior federal judgment.

[1108] * * *

The Court is convinced that Federal Rule of Civil Procedure 41(b), Fourth, Fifth, Ninth Circuit case law and the *Andes [v. Paden, Welch, Martin & Albano* 897 S.W.2d 19 (Mo. 1995)] holdings mandate this Court *to find the judgment of the District Court for the Central District of California*, dismissing Semtek's claims on statute of limitations grounds, *a final judgment on the merits, and therefore prohibits Semtek from relitigating these claims in Maryland due to res judicata*. Federal law does not permit [Semtek] to shop indefinitely for a forum that will give credence to their arguments. [Semtek] had its day in Court for this action and apparently was not satisfied with [the California District Court's] decision. Semtek could have originally filed this suit in Maryland state court, but instead filed this action in California. Thus, Semtek should be bound by California's two year statute of limitations and [the California District Court's] decision dismissing the action. Lockheed should not be forced to follow [Semtek] from state to state to defend an action previously decided in another jurisdiction. Accordingly, the Court agrees with Lockheed in that the fairest and most efficient use of federal and state judicial resources mandates that this Court grant Lockheed's Motion to Dismiss Semtek's Maryland Complaint with prejudice.

(Emphasis supplied). This timely appeal followed.

The propriety of Judge Kaplan's dismissal of Semtek's suit on the ground o[f] *res judicata* is the sole issue before us on this appeal.

Preclusive Effect of Federal Judgment Determined by Federal Law

Semtek argues that our analysis of whether the Maryland action is barred on *res judicata* grounds should be dictated by California state law and that Judge Kaplan erroneously applied federal law when making his determination. We disagree.

In *Kent County Bd. of Ed. v. Bilbrough*, 309 Md. 487, 494 (1987), the Court of Appeals unambiguously stated that "federal law determines the effects under the rules of *res judicata* of a judgment of a federal court," quoting with approval Restatement (Second) of Judgments, § 87 (1982). *See also Douglas v. First Security Federal Savings Bank, Inc.*, 101 Md. App. 170, 179 (1994). The case law is well settled that it is federal law that determines the preclusive effect of a federal judgment. *Brooks v. Arlington Hosp. Ass'n*, 850 F.2d 191, 195 (4th Cir. 1988); *Agrilectric Power Partners, Ltd. v. General Electric Co.*, 20 F.3d 663, 664-65 (5th Cir. 1994); *Luxford v. Dalkon Shield Claimants Trust*, 978 F. Supp. 221, 223 n.6 (D. Md. 1997); *Green v. Kadilac Mort. Bankers, Ltd.*, 936 F. Supp. 108, 114 (S.D.N.Y. 1996); *Bostic v. Allstate Ins. Co.*, 866 F. Supp. 959, 959 (W.D. Va. 1994).

After quoting from *Kent County Bd. of Educ. v. Bilbrough*, Judge Kaplan ruled that federal law would determine the preclusive effect in Maryland of the May 8, 1997 judgment of the California District Court:

> Accordingly, because Semtek does not deny that the United States District Court for the Central District of California dismissed every claim contained in Semtek's current Maryland complaint with prejudice on statute of limitations grounds, federal law must be

employed to determine the preclusive effect of this prior federal court judgement.

Federal Rule of Civil Procedure 41(b)

The applicable federal law to which Judge Kaplan then turned in his Memorandum Opinion was Federal Rule of Civil Procedure 41(b), which provides, in pertinent part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a **[1109]** party under Rule 19, *operates as an adjudication upon the merits*.

(Emphasis supplied). In applying Federal Rule 41(b) to the case at hand, Judge Kaplan further ruled:

> The plain language of the rule requires that the dismissal of the Plaintiff's California action be deemed an adjudication on the merits and warrants dismissal of Semtek's duplicative Maryland complaint with prejudice.

The prior decision that Judge Kaplan afforded preclusive effect was the May 8, 1997 judgment of the California federal district court. That judgment, by its express language, dismissed Semtek's suit **IN ITS ENTIRETY ON THE MERITS AND WITH PREJUDICE**. In the immediate wake of that judgment, Semtek did not seek to alter, amend, or revise the wording of the judgment in any way. Semtek appealed the merits of the decision to the Ninth Circuit. On February 25, 1999, the Ninth Circuit affirmed, on the merits, the District Court's dismissal of Semtek's complaint. The Ninth Circuit opinion volunteered no adverse comment on the wording of the dismissal order.

The Federal Court's Subsequent Reference To Its Earlier Judgment

In an effort to fend off the preclusive effect of the May 8, 1997 judgment, Semtek argues that the same federal district court that issued the May 8, 1997 dismissal order has, in effect, subsequently and significantly ameliorated that order. Judge Kaplan did not accept that argument nor do we.

After Semtek had refiled its suit in the Circuit Court for Baltimore city, one of the defensive maneuvers of Lockheed was to go back to the federal district court in California and to move, on July 23, 1997, for an All Writs Act injunction seeking to bar Semtek from bringing the action in Maryland on the grounds of *res judicata*. On August 11, 1997, United States District Court judge Audrey B. Collins, the same judge who had issued the earlier order of May 8, 1997, denied Lockheed's request for an injunction. In her 14-page Opinion and Order Judge Collins pointed out that the decision to issue an injunction under the All Writs Act, 28 U.S.C. § 1651(a), is discretionary and is "an extraordinary remedy that should be narrowly tailored and rarely used." *Moy v. United States*, 906 F.2d 467, 470 (9th Cir. 1990). Judge Collins concluded that "because the resolution of the *res judicata* issue is far from obvious, the Court declines to determine the issue." She reasoned that the preclusive effect of the earlier action "is properly left to the Maryland state or district court." She expressly stated that "Lockheed's argument that the doctrine of *res judicata* bars the Maryland case may be brought before the proper court in a motion to dismiss or motion for summary judgment based on *res judicata* preclusion."

In passing, Judge Collins observed, "This Court's prior order did not reach the substantive merits of Plaintiff's tort claims. If another proper forum will afford Plaintiff the opportunity to fully litigate the merits of its cause of action, without applying a statutory or *res judicata* bar, the Court does not find it appropriate to bar plaintiff from proceeding in that

forum." That first quoted sentence is the language on which Semtek now relies for its proposition that the judgment of May 8, 1997, has now been effectively altered.

The Inconsequentiality of *Dicta*

Judge Collins, however, also stated very emphatically that

> the Court must reiterate that these issues are properly decided by the proper court in Maryland, and *any dicta or other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of the issues of removal jurisdiction and res judicata preclusion.*

(Emphasis supplied).

Judge Kaplan rejected Semtek's argument and abided by Judge Collin's wishes **[1110]** with respect to the non-persuasive status of her passing comments.

> Semtek argues that Rule 41(b) should not be applied because the United States District Court for the Central District of California's order denying Lockheed's request for a permanent injunction states that the court had not reached the "substantive merits" of Semtek's claims.
>
> Plaintiff's argument is flawed for several reasons. First and foremost, neither party stated an objection to the Order signed by Judge Collins dismissing the United States District Court for the Central District of California action, in its entirety on the merits and with prejudice. This Order states that, "IT IS ORDERED, ADJUDGED AND DECREED, that Plaintiff Semtek International Incorporated take nothing on its complaint in this action, that the action can be dismissed in its entirety on the merits and with prejudice, and that the judgment be entered forthwith in favor of the defendants . . . ." Secondly, Judge Collins explicitly stated in footnote 13 of her opinion that . . . "the Court must reiterate that these issues are properly decided by the proper court in Maryland, and any dicta or other discussion within this opinion should not be cited or argued [as] persuasive authority for the Maryland courts' consideration of . . . *res judicata* preclusion." Furthermore, the District Court expressly requested that the parties not cite any dicta contained in that order.

Self-evidently, Judge Kaplan was as free to disregard Judge Collins's characterization of her earlier order in the course of later dicta, indeed to disregard her characterization at her express direction, as he would have been free to disregard a similar characterization attributed to her in the course of cocktail party conversation. We see no error.

The Effort to Amend the Federal Judgment

The very argument in this regard that Semtek now makes was also made to both the Ninth Circuit and the federal district court in California. Early in the pendency of Semtek's appeal of Judge Kaplan's decision to this Court, Semtek sought to have the federal district court amend its judgment of May 8, 1997 in order to correct the allegedly "clerical" mistake of seeming to have dismissed Semtek's suit "with prejudice and on the merits" and to "clarify" the May 8, 1997 judgment by deleting any reference to its having been "on the merits."

The memoranda in support of both 1) Semtek's motion in the Ninth Circuit, filed on October 5, 1998, and 2) Semtek's

motion in the federal district court, filed October 19, 1998, recite at length 1) Judge Kaplan's decision in the Circuit Court for Baltimore City to dismiss Semtek's suit on the ground of *res judicata*, 2) Judge Kaplan's reliance on the fact that the May 8, 1997 federal district court judgment stated that it was "on the merits," and 3) Judge Collins's later characterization of her May 8, 1997 judgment. With full knowledge of all the facts and of the impact of those facts, both the Ninth Circuit and the federal district court, albeit on procedural grounds, denied Semtek's motions "to amend," "to correct," or "to clarify" the judgment of May 8, 1997. That judgment is today exactly as it was on May 8, 1997. "The moving finger writes and, having writ, moves on."

Judge Kaplan's Further Analysis

Quite aside from *Kent County Board of Education v. Bilbrough* and Federal Rule of Civil Procedure 41(b), Judge Kaplan found independent support for his decision in the dispositive cases of *Shoup v. Bell & Howell*, 872 F.2d 1178 (4th Cir. 1989) and *Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, *reh'g denied en banc*, 880 F.2d 818 (5th Cir. 1989). While he "recognize[d] that Fourth Circuit and Fifth Circuit cases are not binding on Maryland State Courts," he nonetheless concluded that they "provide sufficient persuasive authority on the proper application of federal preclusion principles **[1111]** governing the resolution of this Motion."

Shoup v. Bell & Howell

Although *Shoup* and *Thompson Trucking* are, to be sure, not binding on Maryland courts, we, like Judge Kaplan, find them to be highly persuasive authority. In *Shoup*, as in this case, suit was originally brought in a state court, in that case in Pennsylvania. In that case, as in this, the suit was removed to

the federal district court on the basis of diversity of citizenship. In that case, as in this, the defendant moved to have the suit dismissed because the state statute of limitations had run before the suit was originally filed in the state court. The Pennsylvania statute of limitations in that case, as the California statute of limitations in this case, was two years. In that case, as in this, the federal district court dismissed the suit because the underlying state statute of limitations had run.

In that case, as in this, the plaintiff refiled essentially the same suit in the Circuit Court for Baltimore City in an obvious effort to take advantage of Maryland's more generous three-year statute of limitations. In that case, unlike this one, the case was again moved to federal district court on the basis of diversity of citizenship.[2] In that case, as in this, the defendant moved to have the subsequently filed suit dismissed on the ground of *res judicata*.

Whereas in this case Judge Kaplan granted the defendant's *res judicata* motion, in that case Judge Walter E. Black, Jr. denied that defendant's *res judicata* motion. Whereas the unsuccessful defendant there appealed to the United States Court of Appeals for the Fourth Circuit, the unsuccessful plaintiff here has appealed to us. The Fourth Circuit was then, as we are now, faced with the preclusive effect of an earlier federal dismissal of a diversity case as time-barred on a subsequent refiling of essentially the same action in a new forum. The only difference between the *Shoup* case and the case now before us is that the new forum in that case was a second federal court whereas the new forum in this case was a Maryland state court.

In the *Shoup* case, as in this case, the earlier judgment that was urged as one having preclusive effect was the judgment of a federal district court, in that case sitting in Pennsylvania as in this case sitting in California. Before stating the question there,

---

[2] It was there consolidated with an identical suit that had simultaneously been filed in the United States District Court for the District of Maryland.

which is almost precisely the same as the question here, the *Shoup* opinion held that federal law determines the preclusive effect of an earlier federal judgment:

> We note at the outset that *federal, not state, law determines the preclusive effect of a prior federal judgment, including the question of whether that judgment was on the merits*. It is true that plaintiff filed her Maryland lawsuit within that state's three-year limitations period for personal injury actions. That fact, however, does not determine whether an earlier identical action between the parties, found to be time barred because it was not filed within Pennsylvania's two year statute of limitations, precluded the plaintiffs from bringing the Maryland lawsuit.

872 F.2d at 1179 (citations omitted; emphasis supplied).

At the District Court level in *Shoup*, Judge Black had ruled, essentially as Semtek argues here, that "Maryland law regards the Pennsylvania [California] statute of limitations as procedural," 872 F.2d at 1179, and, therefore, as no bar to a subsequent suit in a Maryland Court "where the Pennsylvania [California] statute is inapplicable." *Id.* The Fourth Circuit opinion disagreed, reasoning that it is the federal judgment itself that is the critical point for measuring possibly preclusive effect and not some more anterior and peripheral state law that may have been **[1112]** considered in arriving at the federal judgment. *Shoup* also pointed out that whatever preclusive effect an earlier federal judgment may have is not diminished because it was rendered in a diversity case:[3]

---

[3] The case law is well settled that the preclusive effect of a federal judgment is not in any way diluted because the federal case happens to be a diversity of citizenship case and that this principle is not in any way in conflict with the so-called "*Erie* Doctrine" established by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In *PRC Harris v. Boeing Co.*, 700 F.2d 894, 897, n.1 (2nd Cir. 1983), the Second Circuit observed:

> While state law certainly controls the rights and duties of the parties in a federal action founded upon diversity of citizenship, *Erie R. Co. v. Tompkins* (1938), this circuit has recognized that "*whether a federal court sits in diversity or has some other basis of jurisdiction, questions of the effect and scope of its judgment involve the power of the federal tribunal itself, and are not varied*

> Harris asserts that application of Rule 41(b) to dismissals on statute of limitations grounds in a diversity case would raise potential constitutional problems under the "Erie doctrine". . . because it would have the effect of abrogating state substantive law. This court explicitly considered and rejected such a claim in *Kern v. Hettinger*, noting that while state law controlled the rights and obligations of the parties, determining the *res judicata* effect that will be given the judgment of a federal court is distinctively a matter of federal law.

(Citations omitted).

In *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962), the Second Circuit also pointed out:

> One of the strongest policies a court can have is that of determining the scope of its own judgments. It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. The rights and obligations of the parties are fixed by state law. These may be created, modified and enforced by the state acting through its own judicial establishment. But we think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights. The Erie doctrine is not applicable here.

(Citations omitted). *See also Cemer v. Marathon Oil Co.*, 583 F.2d 830, 831 (6th Cir. 1978).

> *merely because state rules of decision underlie the judgment." The judgment of a federal court is no less a federal judgment because it was rendered in diversity. "Federal law determines the effects under the rules of res judicata of a judgment of a federal court,"* Restatement (Second) of Judgments § 87 (1982), just as in a state court the law of the state in which the judgment was rendered determines the preclusive effect a federal court must give the judgment. Any other result would consign the effect of federal judgments to the uncertainties of state law in whatever jurisdiction a subsequent suit happened to be brought.

872 F.2d at 1179-80 (citations omitted; emphasis supplied).

Full Faith and Credit:
To Whom and To What?

The misconception the *Shoup* opinion was attempting to overcome is the fundamental flaw that permeates Semtek's argument in this case. Semtek stubbornly continues to ignore the **May 8, 1997 judgment** of the federal district court as the source of preclusion in this case and to try to look behind it to anterior California state law. There was no California state judgment in this case. Although the federal district court may have considered some underlying California state law, the federal judgment did not thereby become a California state judgment nor lose its status as a federal judgment.

Semtek nonetheless persistently argues as if there existed some ethereal and transcendent California state judgment to which Maryland should now extend "full faith and credit" under Article IV, § 1 of the United States Constitution. It has confected an incorporeal version of the **[1113]** "full faith and credit" doctrine, by which full faith and credit should be

extended to a hypothetical judicial proceeding in California that never occurred. Semtek wants Maryland to extend full faith and credit to what, in Semtek's opinion, a California state court **WOULD HAVE DONE, HAD THE SUIT ACTUALLY BEEN TRIED** in a California state court, which it was not. Article IV, § 1, however, concerns actual "Judicial Proceedings" in another jurisdiction and not hypotheticals. Except for narrative purposes, the State of California and the state law of California do not figure into the preclusion issue now before us.

It is in this regard that Semtek reads into the opinion of this Court in *Osteoimplant Technology v. Rathe Productions*, 107 Md. App. 114, 666 A.2d 1310 (1995), a meaning that we never intended to convey. In *Osteoimplant* a judgment was rendered against a defendant in the United States District Court for the Southern District of New York. The judgment was subsequently recorded in the Circuit Court for Baltimore County so that garnishment proceedings could be initiated against the judgment-debtor. In that court, however, the judgment-debtor "filed a motion to vacate the New York federal court judgment." 107 Md. App. at 117. Our holding in *Osteoimplant* was that, as a general rule, "the judgment is only subject to reopening in the court which rendered" it. 107 Md. App. at 117-18.

Prior to entering into an analysis of the actual issue in that case, an issue not here pertinent, we prefaced that analysis with a brief one-paragraph preamble to signal that we were about to deal with the general subject of full faith and credit:

> Our analysis begins with Article IV, § 1 of the United States Constitution, which mandates that States give "full faith and credit" to each others' acts, records, and judicial proceedings. The United States Congress has prescribed, as authorized under the Full Faith and Credit Clause, the manner in which the Clause is to be given effect. 28

> U.S.C. § 1738 (1988). Our courts are required to give full faith and credit to a judgment of a Federal court located in another state as a judgment issued by a State court within whose jurisdiction that Federal court is located. *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 645, 20 S. Ct. 506, 508-09, 44 L. Ed. 619 (1900).

107 Md. App. at 119.

Our purpose, we thought, was clear. Our first sentence referred to the obvious starting point of the Full Faith and Credit Clause of the United States Constitution. That constitutional provision, however, only expressly mandates full faith and credit among the states and not between the states and the federal government. In *Osteoimplant*, however, we were dealing with a judgment from a federal court and some further explanation was therefore required as to why full faith and credit was due to it.

Our second sentence made reference to the statutory Full Faith and Credit Act, now codified as 28 U.S.C. 1738, as an extension of the full faith and credit principle to the relationship between the federal courts and the state courts. Reference in that preamble was also made to the Supreme Court decision of *Hancock National Bank v. Farnum*, 176 U.S. 640 (1900), which elaborated on full faith and credit between the states and the federal courts.

Having thus established our major premise and our minor premise, our completion of the syllogism with a statement of the obvious conclusion should have been clear: Maryland courts will give full faith and credit to a judgment of a federal court sitting in another state as surely as they will give full faith and credit to a judgment of the state court itself. With that preamble thus having established the context, we went on to discuss the full faith and credit that was due in that case to the United States District Court for the Southern District of New York. *And see Smith Pontiac v. Mercedes,* **[1114]** 123 Md.

App. 498, 503, 719 A.2d 993 (1998).

Our conclusion, in that preamble, that we would treat the judgment of a federal court sitting in another state just as we would treat a judgment of the state court itself, to wit, with equal deference, was by no means a statement that we would treat the federal judgment **AS IF IT WERE** a judgment of the state court. Such an issue was not remotely before us in *Osteoimplant* and the proposition for which Semtek cites *Osteoimplant* never crossed our minds.

In retrospect, it might have been more artful if in our third sentence we had said "just as to" a judgment issued by a state court instead of "as" a judgment issued by a state court, but in its unmistakable context that meaning should have been clear. Appellate opinions are not chiseled in marble and the inadvertent difference between "as" and "just as to," unsupported by any other indication, simply will not hold the weight that Semtek seeks to place upon it. To refer, moreover, to this incidental and possibly slack phrasing as the "holding" of *Osteoimplant* is deliberately misleading.

The *Shoup* Ruling

The *Shoup* opinion went on to point out that, contrary to Judge Black's ruling in the District Court, Federal Rule of Civil Procedure 41(b) articulates the federal preclusion principle that a dismissal on statute of limitations grounds constitutes an adjudication on the merits:

> *The plain language of the Rule indicates that the dismissal of plaintiffs' Pennsylvania action on statute of limitations grounds is an adjudication on the merits.* The federal court in Pennsylvania did not otherwise specify the dismissal to be "without prejudice," and the Shoups failed to move the court, pursuant to Fed.R.Civ.P. 59(e) or 60(b)(6), to specify that the judgment was "without prejudice."

Moreover, the dismissal was not one "for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19," nor was it a dismissal for want of a proper case or controversy, which some courts have held to be within the jurisdictional exception of Fed.R.Civ.P. 41(b).

Numerous courts have held that a Rule 41(b) limitations dismissal is a judgment on the merits. In a case analogous to the present one, *PRC Harris*, 700 F.2d 894 (2d Cir. 1983), plaintiffs brought an action in New York state court against Boeing identical to a federal action in Washington dismissed earlier on statute of limitations grounds. That case, like this one, was removed to federal court. The Second Circuit affirmed the judgment of the district court in Boeing's favor, holding that a "dismissal for failure to comply with the statute of limitations will operate as an adjudication on the merits . . ." The court added that Rule 41(b) dictates this result because *"all but certain enumerated dismissals will be considered 'on the merits,' and the Rule does not exempt a dismissal on statute of limitations grounds from its general operation."* We find this reasoning compelling.

872 F.2d at 1180 (citations omitted; emphasis supplied).

The reasoning of the *Shoup* opinion, unlike the holding of the *Shoup* opinion, is not limited to situations where the second forum also happens to be a federal forum. The rationale is more general in its energizing logic:

> Federal law, however, does not permit a plaintiff to shop indefinitely for favorable

> statutes of limitations in every state where personal jurisdiction over a defendant might be found. We need not ponder all the factors that may have led plaintiff to file first in a Pennsylvania forum, for we are not at liberty to vary the principles of preclusion to accommodate them. The doctrine of res judicata "'is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should **[1115]** be cordially regarded and enforced by the courts.'"

872 F.2d at 1182.

Although the incremental preclusive effect is redundant, the original judgment in our case is actually more foreclosing than was the original judgment in *Shoup*. In that case, the original dismissal of the suit was silent as to whether it was "on the merits" and "with prejudice." Under Civil Rule 41(b), however, it was deemed to be so in the absence of any indication to the contrary. In our case, by contrast, the judgment of the United States District Court was expressly stated to be "on the merits and with prejudice."

Thompson Trucking v. Dorsey Trailers

Equally persuasive, both to Judge Kaplan and to us, is the Fifth Circuit decision of *Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, *reh'g denied en banc*, 880 F.2d 818 (5th Cir. 1989). In *Thompson Trucking*, as in this case, suit was filed originally in a state court, in that case Louisiana. In that case, as in this, the case was moved to a federal district court on the ground of diversity of citizenship. In that case, as in this, the federal diversity action was dismissed "with prejudice" because the underlying state statute of limitations

(the Louisiana one-year statute) had run. In that case, more anticipatorily than in this, a second and duplicative suit had already been filed in the United States District Court for the Southern District of Mississippi before the suit earlier removed to the United States District Court for the Western District of Louisiana dismissed. The state of Mississippi had a six-year statute of limitations.

In that case, as in this, the defendants ultimately moved to have the second suit dismissed on the ground of *res judicata*. In that case, unlike in this one, the federal district court in Mississippi denied the motion to dismiss. 677 F. Supp. 478 (S.D. Miss. 1988). In an earlier round of litigation in this case, Semtek relied heavily on that federal district court decision.

Holding that the preclusive "effect of a prior federal diversity judgment is controlled by federal rather than state *res judicata* rules," 870 F.2d at 1045, the Fifth Circuit reversed. It posed the question before it as "whether the Louisiana federal district court's dismissal of Thompson's action on prescriptive grounds was a final judgment on the merits for *res judicata* purposes." *Id.* Persuaded by the reasoning of both *Nilsen v. City of Moss Point*, 674 F.2d 379 (5th Cir. 1982), *aff'd on rehearing*, 701 F.2d 556 (1983) (en banc) and *Mathis v. Laird*, 457 F.2d 926 (5th Cir. 1972), the Fifth Circuit "determined that the dismissal with prejudice by the Louisiana federal district court of Thompson's claims because they had prescribed was a final judgment on the merits" and that "Thompson's subsequent action filed in Mississippi federal district court is barred under the doctrine of *res judicata*." 870 F.2d at 1046.

A small part of the Fifth Circuit's rationale dealt, to be sure, with the intramural value of *res judicata* within the four corners of the federal system, but the major thrust of the reasoning was of more universal import:

> Multiple litigation is costly, both in terms of the expense incurred by a party who must defend against the same claim in different courts as well as the expense resulting from

> the inefficient use of the federal judicial machinery. Allowing plaintiffs who fail to comply with applicable statutes of limitations to move to the next state over would have the undesirable effect of encouraging forum shopping and rewarding dilatory conduct.
>
> In that regard, if *res judicata* were unavailable in the instant case, the defendants, having once engaged counsel in Louisiana, would be faced with the prospect of again hiring counsel in Mississippi to defend against the same action one more time. Additionally, the prospect of compelling the already overburdened district courts of the United **[1116]** States to hear the same claims over and over again in different states is, in our view, unappealing. If Thompson had elected to do so, he could have filed suit in Mississippi to begin with and thereby availed himself of that state's longer period of prescription. Thompson chose, however, to file first in Louisiana and accordingly he was responsible for compliance with that state's prescriptive period.

Id.

The Dominant Theme of the Federal Cases

In addition to the Fourth and Fifth Circuits, almost all of the United States courts of appeals that have considered this question have reached the same conclusion, to wit, that the dismissal of a suit by a federal court based on the running of the statute of limitations will, absent a clear directive to the contrary, be deemed a dismissal on the merits that will bar the filing of a subsequent suit on the ground of *res judicata*. See *Kale v. Combined Ins. Co. of America*, 924 F.2d 1161, 1164,

cert. denied, 502 U.S. 816 (1st Cir. 1991) ("It is beyond peradventure that the dismissal of a claim as time-barred constitutes a judgment on the merits, entitled to preclusive effect."); *Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) ("Our survey of recent cases suggests a clear trend toward giving claim-preclusive effect to dismissals based on statutes of limitations."); *PRC Harris v. Boeing Co.*, 700 F.2d 894, 896-97, *cert. denied*, 464 U.S. 936 (2nd Cir. 1983) ("The longstanding rule in this Circuit . . . is that a dismissal for failure to comply with the statute of limitations will operate as an adjudication on the merits, unless it is specifically stated to be without prejudice."); *Kern v. Hettinger*, 303 F.2d 333, 339-40 (2nd Cir. 1962) ("[I]n view of the unequivocal language of Rule 41(b) and the absence of the words 'without prejudice,' we must and do decide that the dismissal was on the merits and that it was intended to be on the merits."); *Haefner v. County of Lancaster*, 543 F. Supp. 264, 266 (E.D. Pa. 1982), *aff'd*, 707 F.2d 1401 (3d Cir. 1983) ("[D]ismissal of a suit as time-barred establishes a *res judicata* bar."); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("A summary judgment on the basis of the defense of statute of limitations is a judgment on the merits."); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978); *Myers v. Bull*, 599 F.2d 863, 865, *cert. denied*, 444 U.S. 901 (8th Cir. 1979) (Petitioner's attempt to relitigate claims "barred by the *res judicata* effect of the district court's decision . . . that the claims were brought outside the period of the applicable statute of limitations."); *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1331 n.3 (9th Cir. 1981); *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29, *cert. denied*, 502 U.S. 952 (10th Cir. 1991) ("We therefore agree with the Sixth Circuit and other circuits in holding that a dismissal on limitations grounds is a judgment on the merits.").

Pertinent also is the observation of the Supreme Court in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228, 115 S. Ct. 1447, 131 L. Ed. 2d 328, 348 (1995):

> *The rules of finality*, both statutory and judge made, *treat a dismissal on the statute-of-limitations grounds* the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: *as a judgment on the merits.*

(Emphasis supplied). *See also* 5 J. Moore, *Moore's Federal Practice*, § 41.14 (2d ed. 1987).

The Seventh Circuit: A Minor Counter-theme

The holding of the Seventh Circuit in *Reinke v. Boden*, 45 F.3d 166, *cert. denied*, 516 U.S. 817 (7th Cir. 1995), is not out of line with the other federal cases listed above, although the tone of the opinion reflects an inclination **[1117]** to confine the preclusive effect of Rule 41(b) to the intramural setting of two successive federal actions.

In the *Reinke* case itself, however, the forum wherein the suit was initially dismissed as time-barred under Minnesota's six-year statute of limitations was not a federal court but a Minnesota state court. The suit was subsequently refiled, as a diversity action, in the federal district court for Northern Illinois. The defendants there moved to dismiss the suit on the basis of *res judicata*. The issue was what preclusive effect should have been given by the federal district court in Illinois to the earlier dismissal of the suit by a Minnesota state court on the basis of limitations.

Art. IV, Sect. 1's "Full Faith and Credit" requirement applies, of course, only to the states and not to the federal courts. The federal statutory counterpart of the full faith and credit clause is 28 U.S.C. § 1738. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 463, 102 S. Ct. 1883, 72 L. Ed. 2d 262, 268 (1982), the Supreme Court explained:

> As one of its first acts, Congress directed that all United States courts afford the same full faith and credit to state court judgments that would apply in the State's own courts. Act of May 26, 1790, ch 11, 1 Stat 122, 28 U.S.C. § 1738.

Pursuant to that statutory full faith and credit provision, the federal district court in Illinois was enjoined to extend to the earlier dismissal of the suit in Minnesota on limitations grounds whatever preclusive effect Minnesota state law indicated the dismissal should enjoy. "28 U.S.C. § 1738 . . . 'requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.'" *Reinke*, 45 F.3d at 167.

The Seventh Circuit concluded that Minnesota is among the majority of states that treat the limitations defense as "procedural" in nature and of no preclusive effect on subsequent filings in other jurisdictions, state or federal.

> Because Minnesota adheres to this traditional view of the procedural nature of statute[s] of limitations, the Minnesota courts' conclusion that the cause of action is barred by its statute of limitations is, on its face, nothing more than a determination that the action is time-barred in Minnesota. A Minnesota judgment holding that the Minnesota statute of limitations bars the maintenance of a suit in Minnesota says nothing about whether Illinois will allow the suit.

45 F.3d at 170.

Deferring to the non-preclusive approach of the Minnesota state court in which the judgment of dismissal had been rendered, the Seventh Circuit held that the subsequent diversity action in the federal district court in Illinois was not barred by

res judicata. The preclusion law of the first forum controlled the *res judicata* ruling of the second forum.

Before the Seventh Circuit, however, the defendants had strongly pushed the argument that Minnesota referred to a limitations dismissal as being "on the merits" and that that linguistic usage, even if in a different context, should somehow "trump" Minnesota's otherwise clear position on the non-preclusive nature of such a dismissal. It was in making that argument that the defendants referred to the whole body of Rule 41(b) case law and it was in deflecting that argument that the Seventh Circuit effectively consigned that whole body of Rule 41(b) case law to its literal intramural context. That whole discussion, however, was simply part of a very tangential argument.[4] **[1118]**

---

[4] The Seventh Circuit primarily rejected the defendants' argument in this regard by pointing out that Minnesota clearly did not intend for its use of the phrase "judgment on the merits" to have the same preclusive effect that that same phrase has been given within the context of Federal Rule of Civil Procedure 41(b). The *Reinke* opinion described the broader connotation that the defendants sought to attribute to the phrase:

> The district court was of the view that this straightforward analysis was complicated by the fact that Minnesota, as a matter of its internal procedural rules, has termed a dismissal on the ground of statutes of limitations to be a "judgment on the merits." This rule, according to the district court's analysis, trumps Minnesota's frank and explicit acknowledgment that statute of limitations matters are procedural and that a forum ought to use its own procedure.

45 F.3d at 170.

The Seventh Circuit then pointed out that the Minnesota Court of Appeals obviously did not intend for the phrase to be given so sweeping a preclusive effect:

> Although the Minnesota Court of Appeals has noted that a statute of limitations dismissal amounts to a dismissal on the merits, it has not done so in the context of the intersystem situation presented here. . . . Moreover, in this very case, the state trial court in Minnesota noted that it was "well-settled in our

The square holding of *Reinke* was that the second forum, where *res judicata* is being considered, will defer to the preclusion law of the first forum, where the judgment of dismissal was initially and formally rendered. With respect to the potential impact of the first forum's dismissal of a suit as time-barred on a *res judicata* question in the second forum, it is the first forum that calls the tune. That first forum in *Reinke* was a Minnesota state court, and the second forum was guided by Minnesota state law. The first forum in our case was not, as Semtek would like to hypothesize it, a California state court. It was the United States District for the Central District of California where federal preclusion law, not California preclusion law, prevails.

Extending the Rule
Neither Mandated Nor Forbidden

In attempting to deflect the impact of both *Shoup* and *Thompson Trucking*, Semtek several times makes the inaccurate assertion that those cases are "expressly limited" to the intramural situation where the second forum in which preclusion is sought is also a federal forum. Such a statement is flatly wrong. The rule of those cases, to be sure, is not "expressly extended" to a state court as the second forum, but neither is it "expressly limited" to a second federal forum. With respect to the possible extension of their preclusive holdings to a state court, both *Shoup* and *Thompson Trucking* were

---

courts that the limitation of time statutes generally are procedural and that the law of the forum is applied." . . . In short, the Minnesota courts in this litigation took the view that statutes of limitations are procedural and that each forum ought to apply its own. It is difficult to attribute to such a court the intent to make its statute of limitations decision binding on all other jurisdictions.

45 F.3d at 172 (citation omitted).

completely silent. They "expressed" nothing by way of further extension or limitation, for such an issue was not remotely before them.

We find, as did Judge Kaplan, that the policy considerations and the logic undergirding those decisions makes it just as reasonable to extend the preclusive effect of an earlier federal judgment on the merits to a state second forum as to a federal second forum. In response to Semtek's effort to emphasize the jurisdictional distinction, Judge Kaplan ruled:

> The Court does not deny the existence of these distinctions. However, *these distinctions are without difference*. The Fourth Circuit's holding in *Shoup* illustrates that the uniform application of federal preclusion law to prior federal judgments is a prerequisite to preserving the integrity of the federal system. *For the purpose of this analysis, it is irrelevant whether Plaintiff decided to file the second action in state or federal court.*

(Emphasis supplied). We affirm that ruling.

A State Court Looks to Federal Preclusion Law

Andes v. Paden, Welch, Martin & Albano, 897 S.W.2d 19 (Mo. App., W.D. 1995), was a case in which a state court agreed, relying in significant measure on the opinion **[1119]** of the Fourth Circuit in *Shoup*, that a federal dismissal based on limitations grounds would have preclusive effect on a suit still pending in a state court. In *Andes*, the plaintiff sued the defendants in both the Missouri state court and in the United States District Court for an invasion of privacy involving an illegal wiretap. The suit in federal court was dismissed on the ground that the two-year statute of limitations contained in the Federal Wiretap Act had run. On the basis of that dismissal, the defendants then sought to have the suit in the Missouri state

court dismissed on the ground of *res judicata*. Although the legal bases for the two suits were statutorily distinct, the underlying conduct was essentially the same and the two suits were deemed to be on the same cause of action. The trial judge granted the motion to dismiss. The issue before the Missouri Court of Appeals was precisely the issue now before this Court:

> In order for a judgment to operate as a bar to subsequent proceedings, the judgments must have been on the merits. Therefore, *the threshold issue presented here is whether the federal dismissal based on the statute of limitations is a judgment "on the merits" for res judicata purposes.*

897 S.W.2d at 21 (emphasis supplied).

The Missouri Court of Appeals looked in some depth at the Fourth Circuit decision in *Shoup* and then catalogued a large number of federal decisions going the same way. Even though the federal decisions were not literally binding on it, the Missouri Court of Appeals was nonetheless persuaded to hold that the federal dismissal would have preclusive effect in the state courts of Missouri:

> Therefore, we hold that a federal dismissal based on the expiration of the statute of limitations is "on the merits" and may have preclusive effect on a subsequent action filed in the state courts of Missouri, even though the substantive issues of the case have not been addressed.

897 S.W.2d at 23.

The *Erie* Doctrine

Semtek's argument based on an alleged violation of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188

(1938), is perplexingly diffuse. Semtek seems to ignore the fact that the present appeal to this Court is from the decision of Judge Joseph H.H. Kaplan in the Circuit Court for Baltimore City and not from the decision of Judge Audrey B. Collins in the United States District Court for the Central District of California.

The *Erie* Doctrine applies, of course, to federal courts and not to state courts. As it, in 1938, overruled the century-old precedent of *Swift v. Tyson*, 41 U.S. 1, 16 Peters 1, 10 L. Ed. 865 (1842), *Erie* held that in cases initiated in or removed to federal district courts on the basis of diversity of citizenship, the federal court should apply the substantive law of the state wherein the justiciable event took place. The justiciable event in this case took place in the State of California, and Semtek's suit against Lockheed was originally filed in a California state court. When the suit was subsequently removed to the United States District Court for the Central District of California, that court was, by the *Erie* Doctrine, enjoined to apply the substantive law of the State of California, including the applicable California statute of limitations. We have every reason to believe that the federal district court correctly applied the substantive state law of California.

Semtek's argument to the contrary seems to run as follows: 1) California, like Minnesota in the *Reinke v. Boden* case, treats its statute of limitations as only procedural in nature; 2) California, therefore, treats its dismissals of actions as time-barred as not having any preclusive effect on similar suits filed in other jurisdictions; **[1120]** 3) California considers its *res judicata* or preclusion law as part of its substantive law; and 4) the federal district court, in this diversity case, should have treated its judgment of dismissal as similarly non-preclusive. When Judge Collins ordered, therefore, that the dismissal on limitations grounds be "on the merits and with prejudice," instead of making it clear that the dismissal had no such preclusive effect, she thereby violated the *Erie* Doctrine.

As we shall discuss *infra*, we do not believe that to have been the case. Even if it were, however, Semtek's appeal to this Court is totally inappropriate. If the federal district court judgment was in any way in error, Semtek's remedies were 1) post-trial motions to the federal district court itself, 2) an appeal to the United States District Court for the Ninth District, and 3) a petition for *certiorari* to the Supreme Court of the United States. It is not the job of an intermediate appellate court in Maryland, just as it was not the job of Judge Kaplan in the Circuit Court for Baltimore City, to reverse, to overrule, to modify, to alter, to amend, or to reform the judgment of the United States District Court for the Central District of California. It is, rather, appropriate for us to extend full faith and credit to that judgment, not as Semtek thinks it should be reformulated but as it was unambiguously expressed. *Osteoimplant Technology v. Rathe*, 107 Md. App. 114, 117-18, 666 A.2d 1310 (1995) ("We hold . . . that the judgment is only subject to reopening in the court which rendered the initial judgment. Hence, if appellant wishes to have the judgment vacated, altered, or amended, those issues must be addressed by the United States District Court for the Southern District of New York.").

That being said, however, we further believe that, in the United States District Court, Judge Collins correctly applied the substantive law of the State of California. What Semtek argues is the preclusion law or the *res judicata* law of the State of California is, when looked at precisely, the law as to how California characterizes judgments of dismissal on limitations grounds **RENDERED BY CALIFORNIA STATE COURTS**. There was in this case no judgment of dismissal by a California state court and the California state preclusion law with respect to such a state court judgment, therefore, is utterly immaterial. In *Costantini v. Trans World Airlines*, 681 F.2d 1199 (1982), the Ninth Circuit applied the *res judicata* law of the State of California with respect to a judgment earlier rendered not by a California state court but by a federal district

court sitting, in diversity, in the State of California. The federal district court had dismissed the diversity claim as one barred by *res judicata*. As urged by the plaintiff, the Ninth Circuit agreed "that a federal court sitting in diversity must apply the *res judicata* law of the state in which it sits." 681 F.2d at 1201. It then pointed out, however, that California law, in turn, determines the preclusive effect of a prior federal judgment by looking to federal, not California, preclusion standards. The holding of the Ninth Circuit was clear:

> California's law of *res judicata* dictates what preclusive effect is to be accorded to the prior judgment against appellant. That *California law, however, determines the res judicata effect of a prior federal court judgment by applying federal standards.* Therefore, those federal standards are applicable here to determine the preclusive effect of the prior judgment.

Id. (footnote omitted; emphasis supplied). *See also Bates v. Union Oil Co.*, 944 F.2d 647, 649 (1991), *cert. denied*, 503 U.S. 1005 (1992). Judge Kaplan expressly relied on the Ninth Circuit's decision in *Costantini v. Trans World Airlines* as an alternative ground for his ruling that Semtek's suit was barred by *res judicata*:

> Even if the Court were to ignore the language of Rule 41(b) and accept Plaintiff's arguments distinguishing the [1121] Fourth and Fifth Circuit cases from the present one, the Ninth Circuit has also applied federal law in establishing the preclusive effect of federal judgments on subsequent identical state court actions. For example, the Ninth Circuit in *Costantini v. Trans World Airlines*, 681 F.2d 1199 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982) explained that *[the] California state court would rely on federal law to determine*

the preclusive effect of a federal judgment.

(Emphasis supplied). Two decisions of the Supreme Court of California have also indicated that California will follow federal preclusion law in determining the *res judicata* effect of an earlier federal judgment on a subsequent suit in a California state court. *Younger v. Jensen*, 26 Cal.3d 397, 411, 161 Cal. Rptr. 905, 914, 605 P.2d 813, 822 (1980); *Levy v. Cohen*, 19 Cal.3d 165, 172-73, 137 Cal. Rptr. 162, 167, 561 P.2d 252, 257 (1977).

Conclusion

We affirm the ruling of Judge Kaplan that Semtek's refiling of the suit against Lockheed was barred on the ground of *res judicata*. The earlier dismissal of the suit by the United States District Court for the Central District of California was a judgment on the merits and was entitled to the preclusive effect that Judge Kaplan gave it.

JUDGMENT AFFIRMED;
COSTS TO BE PAID
BY APPELLANT.

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 495
September Term, 1999

(No. 1041, Sept. Term, 1998
Court of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: **DEC 21 1999**

APPENDIX C

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

SEMTEK INTERNATIONAL, INC.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	CASE NO.
	*	
LOCKHEED MARTIN CORP., et al.,	*	97183023
	*	
Defendants.	*	
	*	

* * * * * * * * * * * * * * * * *

MEMORANDUM OPINION

Pending before this Court is Defendant's, Lockheed Martin Corporation's Motion to Dismiss.

I. *BACKGROUND*

Plaintiff, Semtek International Incorporated (hereinafter "Semtek"), originally filed this action on February 26, 1997 in the Los Angeles Superior Court for California. Semtek based its complaint on four separate causes of action: (1) inducing breach of contract with Merkuriy, a Russian satellite communications company; (2) intentional interference with economic advantage with Merkuriy; (3) negligent interference with economic advantage with Merkuriy; and (4) conspiracy to interference with economic advantage with Merkuriy.

On March 11, 1997, Lockheed Martin Corporation (hereinafter "Lockheed") removed the California case to the United States District Court for the Central District of California based on federal diversity jurisdiction under 28 U.S.C. §1332 and 1441(b). The District Court for the Central District of California granted Lockheed's motion to dismiss with prejudice based on California's two year statute of limitations period. Semtek has subsequently appealed that decision to the Ninth Circuit.

During the pendency of the California action, additional investigation by Semtek revealed that much of the alleged tortious conduct occurred in Maryland where the statute of limitations in these causes of action is three years. Accordingly, in July 1997, Semtek filed for relief in the Circuit Court for Baltimore City seeking the same remedy sought previously in the California action. Lockheed removed the case to the United States District Court for the District of Maryland and simultaneously filed a motion to transfer or stay the case.

At the same time, Lockheed also filed for injunctive relief seeking to prevent Semtek from proceeding in Maryland based on theory of *res judicata* due to Judge Audrey Collins' (Central District of California) prior ruling dismissing that action. Judge Collins denied [Lockheed's] request for injunctive relief and after receiving that decision Lockheed withdrew its motion to transfer.

Semtek also filed a motion to remand and Lockheed filed a motion to dismiss in the United States District Court for the District of Maryland. There, the District Court granted Semtek's motion to remand but failed to address Lockheed's motion to dismiss. The case is now before this Court to determine whether the California District Court decision should be given *res judicata* effect.

II. *LEGAL STANDARD*

A complaint is subject to dismissal for failure to state a claim upon which relief can be granted where it appears beyond a doubt that the Plaintiff can prove no facts that would entitle it to the relief sought. See, e.g., *Levy v. E. Stewart Mitchell, Inc.*, 585 F. Supp. 1030 (D. Md. 1984); *Rosengarten v. Buckley*, 565 Supp. 193 (D.Md. 1983); *Hall v. Board of County Commissioners of Frederick County*, 509 F. Supp. 841 (D.Md. 1981). For the purposes of this motions to dismiss, this Court must "assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from the pleadings." *Sharrow v. State Farm Mut. Auto. Ins. Co.*, 306 Md. 754, 768 (1986). Dismissal is appropriate if, assuming the truth of the facts and allegations, those facts fail to afford plaintiff relief. *Faya v. Almaraz*, 329 Md. 435, 443 (1993).

III. *INTRODUCTION*

The central issue that this court has been asked to consider is the preclusive effect of a federal dismissal on a subsequent identical state court action. To accomplish this analysis, the Court must determine whether to apply federal or state law. Pursuant to the clear language of the Federal Rules of Civil Procedure and federal preclusive law, federal law determines the preclusive effect of a prior federal judgment.

IV. *DISCUSSION*

A. FEDERAL RULE OF CIVIL PROCEDURE, 41(B) IS THE CONTROLLING FEDERAL LAW.

In *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 493, 525 A.2d 232, 235 (1987) (quoting Restatement (Second) of Judgments § 87), the Court of Appeals [of] Maryland stated

that "federal law determines the effects under the rules [of] *res judicata* of a judgment of a federal court." Accordingly, because Semtek does not deny that the United States District Court for the Central District of California dismissed every claim contained in Semtek's current Maryland complaint with prejudice on statute of limitations grounds, federal law must be employed to determine the preclusive effect of this prior federal court judgment.

The applicable federal law is Federal Rule of Civil Procedure 41(b). It provides in pertinent part that: " unless the Court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." The plain language of the rule requires that the dismissal of the Plaintiff's California action be deemed an adjudication on the merits and warrants dismissal of Semtek's duplicative Maryland complaint with prejudice.

Semtek argues that Rule 41(b) should not be applied because the United States District Court for the Central District of California's Order denying Lockheed's request for a Permanent Injunction states that the Court had not reached the "substantive merits" of Semtek's claims.

Plaintiff's argument is flawed for several reasons. First and foremost, neither party stated an objection to the Order signed by Judge Collins dismissing the United States District Court Central District of California action, in its entirety on the merits and with prejudice. This Order states that, "IT IS ORDERED, ADJUDGED AND DECREED, that plaintiff Semtek International Incorporated take nothing on its complaint in this action, that the action can be dismissed in its entirety on the merits and with prejudice, and that the Judgment be entered forthwith in favor of defendants . . . ." Secondly, Judge Collins explicitly stated in footnote 13 of her opinion that . . . "the Court must reiterate that these issues are properly decided by

the proper court in Maryland, and any dicta or any other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of . . . *res judicata* preclusion." Furthermore, the District Court expressly requested theat the parties not cite any dicta contained in that order.

B. FEDERAL PRECLUSION PRINCIPLES BAR SEMTEK'S ATTEMPT TO RELITIGATE IN MARYLAND STATE COURT CLAIMS PREVIOUSLY DISMISSED WITH PREJUDICE IN THE CENTRAL DISTRICT OF CALIFORNIA.

Even if this Court was not convinced by *Kent County Bd. of Educ.*, Fourth and Fifth Circuit case authority serve to strengthen the Court's convictions that federal preclusion principles should be applied to determine the *res judicata* effect of the Central District of California's dismissal of all of Semtek's claims on statute of limitations grounds. While this Court recognizes that Fourth Circuit and Fifth Circuit cases are not binding on Maryland State Courts, *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989) and *Steven D. Thompson Trucking Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, *reh'g denied, en banc*, 880 F.2d 818 (5th Cir. 1989) (hereinafter "Thompson Trucking") provide sufficient persuasive authority on the proper application of federal preclusion principles governing the resolution of this Motion.

Defendant relies on *Shoup* to support their proposition that the action should be dismissed and the Court agrees. In *Shoup*, Plaintiffs filed their original lawsuit in Pennsylvania state court alleging only state law personal injury claims. *Id.* at 1178. Defendant removed the case to federal court on diversity of citizenship grounds. Applying Pennsylvania's statute of limitations to the Plaintiff's claims, the District Court dismissed the action as time barred.

Due to the dismissal, the *Shoup* Plaintiffs refiled the exact same lawsuit in state and federal courts in Maryland in an effort

to avail themselves of Maryland's longer statute of limitations. *Id.*at 1178. As a result, the *Shoup* Defendant removed the state court action to federal court on the basis of diversity of citizenship and motioned to have the case dismissed because of *res judicata. Id.* The *Shoup* Plaintiffs argued that because the original federal action only involved state law claims and diversity of citizenship was the sole justification for federal jurisdiction, Maryland law controlled. In addition, Plaintiffs stated that because Maryland law holds that a dismissal as result of statute of limitations is procedural in nature, the Pennsylvania judgment did not represent a final judgment and therefore was not entitled to any *res judicata* effect. Thus, because the case was filed within Maryland's statute of limitations, Plaintiffs asserted that their claims should be permitted to proceed.

In determining the *res judicata* effect of the prior federal judgment, the Fourth Circuit relied on federal law. "Questions about the effect and scope of a federal court judgment involve the power of the federal tribunal itself, and are not varied merely because state rules of decision underlie the judgment" *Id.* at 1179. The Court further stated that Rule 41(b) prescribes that federal judgments based on statute of limitations are final judgments on the merits. *Id.* at 1179-80. The Court explained in pertinent part that:

> "Federal law . . . does not permit a plaintiff to shop indefinitely for favorable statute of limitations in every state where personal jurisdiction over a Defendant might be found. We need not ponder the factors that may have led Plaintiff to file first in a Pennsylvania forum, for we are not at liberty to vary the principles of preclusion to accommodate them. The doctrine of *res judicata* "is not a mere matter of practice or procedure inherited from a more technical time

> than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts . . ."

872 F.2d at 1182 (quoting *Federated Dep't. Stores v. Moitie*, 452 U.S. 394, 401 (1981)).

In further support of its proposition Defendant relies on *Stephen D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044 *reh'g denied, en banc*, 880 F.2d 818 (5th Cir. 1989) (hereinafter "Thompson Trucking"). In *Thompson Trucking*, the Fifth Circuit relying on *Shoup* held that the Federal Court's dismissal with prejudice based on the Louisiana state statute of limitations was a "final judgment on the merits" pursuant to Rule 41(b) barring relitigation of the same claims in a Mississippi state court under Mississippi's longer statute of limitations. *Thompson Trucking*, 870 F.2d at 1046. In making its decision, the Court explained that policy reasons behind its decision.

> "Multiple litigation is costly, both in terms of expense incurred by a party who must defend against the same claim in different courts . . . [a]llowing plaintiffs who fail to comply with applicable statute of limitations to move to next state over would have the undesirable effect of encouraging forum shopping and rewarding dilatory conduct.
>
> In that regard, if *res judicata* were unavailable in the instant case, the defendants having once engaged counsel in Louisiana, would be faced with the prospect of again hiring counsel in Mississippi to defend the same action one more time . . . If [plaintiff] had elected to do so, he could have filed suit in Mississippi to begin with and thereby availed

> himself of the state's longer period of prescription. [Plaintiff] chose, however, to file first in Louisiana and accordingly he was responsible for compliance with the state's prescriptive period."

870 F.2d at 1046.

Semtek attempts to distinguish the present action from *Thompson Trucking* and *Shoup*. Similar to Plaintiffs in *Thompson Trucking*, Semtek asserts that it chose to file its suit originally in California and only came to Maryland after the initial suit was dismissed with prejudice. In addition Plaintiff argues that because *Shoup* is a federal case, it has no binding effect in this action. Relying on the language utilized in the Shoup opinion, Semtek argues that *Shoup* is applicable only where the second case is filed in a federal forum, which they did not do.

> "In this case we must determine if a dismissal by one federal court on statute of limitations grounds bars subsequent litigation of the same claim between the same parties in a second federal forum. The district court held it does not. We reverse and hold that pursuant to Fed. R. Civ. P. 41(b) the earlier statute of limitations ruling is a judgment on the merits subject to claim preclusion."

872 F.2d at 1178.

In both *Shoup* and *Thompson Trucking*, Plaintiffs filed their second action directly in the Federal District Court. Plaintiffs availed themselves voluntarily to the Federal Rules of Civil Procedure after another Federal court dismissed their case. Plaintiffs elected to refile their actions in Federal court and thus imposed the very burden that Rule 41(b) seeks to prevent: forum shopping. Accordingly, the Courts in those

cases applied the doctrine [of] *res judicata* under Rule 41(b) and dismissed the cases.

In the present case, Semtek filed the second action in Maryland state court, not federal court, and Lockheed subsequently removed it. Semtek never sought relief on its own initiative from the Federal System. In both Maryland and California actions, Lockheed removed the cases to Federal Court. In fact the United States District Court in its remand order stated that "Semtek . . . has never alleged anything remotely resembling a federal claim, for both its Maryland and California complaints alleged only state law business torts." Remand Order. Judge Collins addressed this same point in her ruling on Lockheed's attempt to enjoin Semtek's pursuit of the Maryland action.

> ". . . in both *Shoup* and *Thompson Trucking*, the respective Plaintiffs had statutory time bar judgments entered against them in one federal district court, and attempted to relitigate the claims in a second federal court. In order to prevent forum-shopping among the various federal districts, both the Fourth and Fifth Circuits held that Plaintiff's subsequent actions were barred.
>
> In the instant case, however, unlike the Plaintiffs in *Shoup* and *Thompson Trucking*, [Plaintiff] has not purposefully availed itself of a second federal forum. Plaintiff filed both first and second actions in state courts — California and Maryland, respectively. Assuming that the Maryland case is remanded to Maryland state court, the *Shoup* and *Thompson Trucking* holdings would not apply. In the Court's opinion, both holdings were animated primarily by an interest in preventing forum shopping among the federal district courts, which is an unnecessary and wasteful burden upon the federal court system." *See Thompson Trucking*, 870 F.2d at 1046.

Plaintiff argues that the case authority upon which Lockheed relies is inapplicable both because of Judge Collins' opinion as discussed above and also because rule 41(b) does not govern actions in Maryland State Court. Therefore, Plaintiff argues that this Court should not penalize Semtek with a dismissal for federal forum shopping when Lockheed was the only party shopping for the federal forum.

The Court does not deny the existence of these distinctions. However, these distinctions are without difference. The Fourth Circuit's holding in *Shoup* illustrates that the uniform application of federal preclusion law to prior federal judgments is a prerequisite to preserving the integrity of the federal system. For the purpose of this analysis, it is irrelevant whether Plaintiff decided to file the second action in state or federal court. Furthermore as previously discussed, Judge Collins explicitly stated in footnote 13 of her opinion that . . . "the Court must reiterate that these issues are properly decided by the proper court in Maryland, and any dicta or any other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of . . . *res judicata* preclusion." In addition, the [sic] Judge Collins expressly requested that the parties not cite any dicta contained in that order.

This point is further illustrated by *Andes v. Padden, Welch, Martin & Albano*, 897 S.W.2d 19 (Mo. 1995). In *Andes*, the Missouri Court of Appeals upheld the dismissal of a state court tort action. The Court determined that the action was barred due to the *res judicata* effect of a prior federal judgment in which the action was dismissed on limitations grounds. The Court explained that, "*res judicata* is based on the principle that a party should not be allowed to litigate a claim and then after an adverse judgment, seek to relitigate the identical claim

in a second proceeding." *State ex rel. Shea v. Bossola*, 827 S.W.2d 722, 723 (Mo. App. 1992). If Plaintiff failed to comply with Maryland's statute of limitations and this Court dismissed the case on the [sic] those grounds, nothing would prevent Semtek from filing this action in another jurisdiction with a longer statute of limitations. This is the particular type of forum shopping that the Court seeks to prevent.

Even if the Court were to ignore the language of Rule 41(b) and accept Plaintiff's arguments distinguishing the Fourth and Fifth Circuit cases from the present one, the Ninth Circuit has also applied federal law in establishing the preclusive effect of federal judgments on subsequent identical state court actions. For example, the Ninth Circuit in *Constantini v. Trans World Airline*, 681 F.2d 1199 (9th Cir.), cert denied, 459 U.S. 1087 (1982) explained that California state court would rely on federal law to determine the preclusive effect of a federal judgment. It stated in pertinent part that:

> "This court has held that a federal court siting in diversity must apply the *res judicata* law of the state in which it sits. We have applied that rule even where the prior action was in federal court and involved federal questions . . . Hence, California's law of *res judicata* dictates what preclusive effect is to be accorded to the prior judgment against the appellant. That California law, however, determines the *res judicata* effect of a prior federal court judgment by applying federal standards. Therefore those federal standards are applicable here to determine the preclusive effect of the prior judgment."

Id. at 1201; *In Re Silva*, 190 B.R. 889, 892 n.1 (9th Cir. BAR 1995).

III. *CONCLUSION*

The Court is convinced that Federal Rule of Civil Procedure 41(b), Fourth, Fifth, Ninth Circuit case law and the *Andes* holdings mandate this Court to find the judgment of the District Court for the Central District for the Central District of California, dismissing Semtek's claims on statute of limitations grounds, a final judgment on the merits, and therefore prohibit Semtek from relitigating these claims in Maryland due to *res judicata*. Federal law does not permit Plaintiff to shop indefinitely for a forum that will give credence to their arguments. Plaintiff had its day in Court for this action and apparently was not satisfied with Judge Collins' decision. Semtek could have originally filed this suit in Maryland state court, but instead filed this action in California. Thus, Semtek should be bound by California's two-year statute of limitations and Judge Collins' decision dismissing the action. Lockheed should not be forced to follow Plaintiff from state to state to defend an action previously decided in another jurisdiction. Accordingly, the Court agrees with Lockheed in that the fairest and most efficient use of federal and state judicial resources mandates that this Court grant Lockheed's Motion to Dismiss Semtek's Maryland Complaint with prejudice.

/signed/
Joseph H. H. Kaplan
Administrative Judge

Date: April 30, 1998

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Semtek International, Inc.,	CASE NO.: CV 97-1580 ABC (RNBx)
Plaintiff,	**Order Re: Defendants' Motions to Dismiss**
vs.	
Lockheed Martin Corp., et al.,	
Defendants.	

Defendants' Motions to Dismiss came on regularly for hearing before this Court on May 5, 1997. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that Defendants' Motions are GRANTED.

I. Procedural Background

On February 26, 1997, Plaintiff SEMTEK INTERNATIONAL, INC. ("Plaintiff" or "Semtek") filed a Complaint in the Superior Court of the State of California for the County of Los Angeles against Defendants LOCKHEED MARTIN CORPORATION ("Lockheed"), SAMUEL URSINI ("Ursini"), and DOES 1 through 100. In the Complaint, Plaintiff alleged four separate causes of action for: (1) inducing breach of contract; (2) intentional interference with economic advantage; (3) negligent interference with economic advantage; and (4) conspiracy to interfere with prospective economic advantage.

On March 11, 1997, Lockheed properly removed Plaintiff's action to this Court based on federal diversity jurisdiction under

28 U.S.C. §§ 1332 and 1441(b). On March 18, 1997, Lockheed filed its Motion to Dismiss for failure to state a claim. On April 8, 1997, Ursini filed a Motion to Dismiss that was virtually identical to Lockheed's Motion.[1] On April 12, 1997, Plaintiff filed separate, but essentially identical, Oppositions to Lockheed and Ursini's Motions. Lockheed and Ursini filed a joint Reply on April 28, 1997.

II. Plaintiff's Allegations

This case arises from competition amongst three American corporations to solicit and solidify a "joint venture" business relationship with a Russian corporation for the operation and marketing of satellite communication systems. Plaintiff alleges that this competition resulted in tortious conduct, which damaged Plaintiff's contractual rights and prospective economic advantage. Plaintiff's specific allegations are summarized below.

Plaintiff SEMTEK INTERNATIONAL INCORPORATED was formed in 1992 for the purpose of engaging in commercial relationships with emerging Russian private enterprises. [Compl. ¶ 6]. In late October, 1992, several officers of Semtek traveled to Russia to meet with the executive director of MERKURIY, LTD. ("Merkuriy"). [Id.]. Merkuriy had been licensed by the Russian Space Agency to make certain satellites available for commercial use, including the rental of international communications channels for the transmission of voice, video, or data signals. The October 1992 meetings led to the execution on November 5, 1992 of a document entitled "Business Agreement" whereby Semtek and Merkuriy agreed to discuss the creation of a joint venture to develop and use satellite telecommunications systems in which Merkuriy would provide development and launch capability and Semtek would

[1] Defendants Lockheed and Ursini are represented by the same counsel in this action.

provide financing and marketing. [Compl. ¶ 7].

In December 1992, officers of Semtek again traveled to Russia to meet with Merkuriy representatives. [Compl. ¶ 8]. On or about December 19, 1992, Semtek and Merkuriy entered into a written agreement entitled "Protocol," to form a joint venture for the operation and marketing of satellite communications services utilizing the Luch I Satellite configuration. [Id.]. On May 2, 1993, Semtek and Merkuriy executed a further agreement entitled "Letter of Intent to Establish a Joint Venture Company Between Merkuriy, Ltd. and Semtek International Incorporated." [Compl. ¶ 11].

After entering into the "Protocol" and "Letter of Intent" with Merkuriy, Semtek commissioned marketing studies and began to arrange financing for the joint venture. [Compl. ¶¶ 10, 12]. Merkuriy, on the other hand, did not complete many of its preparatory tasks. [Compl. ¶ 15]. On February 2, 1994, Merkuriy wrote to Semtek confirming Merkuriy's intention regarding the founding of a joint venture with Semtek, but extending the time for entering into a formal joint venture agreement until December 31, 1994. [Compl. ¶16].

In May 1994, Merkuriy informed Semtek that MARTIN MARIETTA TECHNOLOGIES, INC. ("Martin Marietta")[2] had expressed an interest in the Luch I Satellite project. [Compl. ¶ 17]. Merkuriy represented that Martin Marietta would supply technical assistance to the project, but confirmed that the Semtek/Merkuriy joint venture was still on course. [Id.].

On July 5, 1994, Merkuriy notified Semtek that the Semtek/Merkuriy joint venture might be in jeopardy due to the involvement of Martin Marietta and a third party. [Compl. ¶ 20]. This was the first indication from Merkuriy that it might breach its agreements with Semtek. [Id.]. On July 6, 1994, Semtek wrote to the Chairman of Martin Marietta formally

---

[2] Plaintiff alleges that Martin Marietta Technologies, Inc. is a predecessor in interest to Defendant Lockheed Martin Corporation.

notifying Martin Marietta of the Semtek/Merkuriy joint venture and the fact that any agreement between Martin Marietta and Merkuriy for commercialization of the Luch I Satellite would conflict with Semtek/Merkuriy joint venture.

On or about July 12, 1994, officers of Semtek met with Ursini (of Martin Marietta) and the President of TRANSWORLD COMMUNICATIONS ("Transworld"). [Compl. ¶ 22]. At that meeting, Transworld stated that Semtek had no joint venture with Merkuriy, that Transworld had a contract with Merkuriy for Luch I Satellite development, and that Martin Marietta was merely engaged in a contractual arrangement with Transworld. [Id.]. Ursini agreed with and endorsed Transworld's position in all respects. [Id.].

On August 1, 1994, Semtek wrote to Ursini notifying him that as the party financing Transworld's venture with Merkuriy for commercialization of the Luch I Satellite, and as the party primarily benefiting from that venture financially, Martin Marietta was interfering with Semtek's ongoing relationship with Merkkuriy. [Compl. ¶ 25].

On August 8, 1994, Merkuriy declared to Semtek that the Letter of Intent was not binding, that the joint venture had to be established by July 4, 1993, and that the joint venture was not formed due to the efforts of Transworld.[3] [Compl. ¶ 26]. Plaintiff alleges that Merkuriy wrote this letter as a direct result of the acts of interference by Transworld and Martin Marietta,

---

[3] In a related case, *Semtek International Incorporated v. Merkuriy Ltd. And Pyotr Sivirin*, Case No. 95-CV-11820 (RCL), filed in the United States District Court for the District of Massachusetts, Semtek declared under penalty of perjury that this August 8, 1994 facsimile from Merkuriy constituted a "unilateral breach of contract between Semtek and Merkuriy and an anticipatory breach of future obligation by Merkuriy . . . ." Affidavit of James L. Newkirk, dated April 5, 1996. The Court takes judicial notice of the Newkirk Affidavit pursuant to Fed. R. Evid. 201. The Court may consider "matters of public record outside the pleadings" in the determination of a Rule 12(b)(6) motion to dismiss. *Mir v. Little Co. of Mary Hospital*, 844 F.2d 646, 649 (9th Cir. 1986).

which caused Merkuiry to disregard the extension given for completion of the joint venture by December 31, 1994. [Id.].

Finally, Plaintiff alleges that, commencing in July 1994 and continuing to the present time, with full knowledge of the agreements and relationship between Semtek and Merkuriy, Martin Marietta and Transworld entered in to and engaged in efforts to secure for themselves a contract with Merkiury for the commercial exploitation of the Luch I Satellite, all in conflict with and in derogation of the known rights of Semtek and the known relationship of Semtek and Merkuriy. [Compl. ¶ 24]. Those efforts culminated in Martin Marietta and Transworld securing a contract with Merkuriy at a later date whereby Martin Marietta and Transworld would provide the financing and marketing for the satellite, and Merkuriy would provide the engineering, technology, and hardware. [Id.]. Martin Marietta and Transworld thereby took over the position and responsibilities of Plaintiff in its relationship with Merkuriy. [Id.]. Plaintiff's claims for inducing breach of contract; intentional interference with economic advantage; negligent interference with economic advantage; and conspiracy to interfere based on the facts stated above.

III. Discussion

A. Motion to Dismiss for Failure to State a Claim

1. Standard

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). A Rule 12 (b)(6) dismissal is proper only where there is either a "lack of cognizable legal theory" or the "absence of sufficient facts

alleged under a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

A court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *see also Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980) (finding that the complaint must be read in the light most favorable to the plaintiff). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations case in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

Furthermore, unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991), *overruled on other grounds* by *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., et al.*, ___ U.S. ___, 114 S. Ct. 1439 (1994). A court may, however, consider exhibits submitted with the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986), *abrogated on other grounds by Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104 (1991).

Lastly, a Rule 12(b)(6) motion " will not be granted merely because [a] plaintiff requests a remedy to which he or she is not entitled." Schwarzer, et al., *Civil Procedure Before Trial* § 9:230. "It need not appear that plaintiff can obtain the *specific* relief demanded as long as the court can ascertain from the face

of the complaint that *some* relief can be granted." *Doe v. United States Dept. of Justice.*, 753 F.2d 1092, 1104 (D.C. Cir. 1985); *see also Doss v. South Central Bell Telephone Co.*, 834 F.2d 421, 425 (5th Cir. 1987) (demand for improper remedy not fatal if claim shows plaintiff entitled to different form of relief).

2. Analysis

The Motions to Dismiss brought by Defendants Lockheed and Ursini are essentially identical in form and substance. Accordingly, they will be considered together in the Court's analysis. Defendants' main argument is that Plaintiff's Complaint must be dismissed because each claim i[s] barred by the applicable statute of limitations. For reasons discussed below, the Court agrees.

Plaintiff alleges four separate causes of action for: (1) inducing breach of contract; (2) intentional interference with economic advantage; (3) negligent interference with economic advantage; and (4) conspiracy to interfere with prospective economic advantage.[4] California courts have held that the two-year statute of limitation specified by Cal. Civ. Proc. Code § 339(1) applies to such torts. *See e.g. Trembath v. Dicardi*, 43 Cal. App. 3d 834, 836 (1974) (two-year statute of limitations for inducing breach of contract); *Kenworthy v. Brown*, 248 Cal. App. 2d 298, 301 (1967) (two-year statute for inducing breach

[4] For purposes of the Court's statute of limitations analysis, Plaintiff's fourth claim for "civil conspiracy" is not directly considered. In California, there is no separate cause of action for "civil conspiracy." Plaintiff acknowledges this fact. [*See* Opposition at p. 8]. When a plaintiff has alleged a non-recognized action for "civil conspiracy" to commit a tort, the applicable statute of limitations is governed by the underlying tort without regard to allegations of conspiracy. *See, e.g., Agnew v. Parks*, 172 Cal. App. 2d 756, 765 (1959) ("There exist[s] no cause of action for conspiracy in and of itself, [therefore,] the statute of limitations is determined by the nature of the action in which the conspiracy is alleged.").

of contract); *McFaddin v. H.S. Crocker Co.*, 219 Cal. App. 2d 585, 591 (1963), *superseded by statute on other grounds as stated in, Levine v. Pollack*, 37 Cal. App. 4th 129 (1995) (two-year statute of limitations for interference with business); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677 (9th Cir. 1980) ("A cause of action for tortious interference with business relationships is governed by the two year statute of limitations.").

Defendants argue that Plaintiff's causes of action accrued more than two years before Plaintiff filed its Complaint. The Court agrees. In general, a cause of action for intentional interference with contract or prospective economic advantage accrues from the date of the wrongful act. *See Engstrom v. Kallins*, 49 Cal. App. 773, 783 (1996) ("a cause of action accrues when, under the substantive law, the wrongful act is done and liability arises . . . ."). In an action for inducement to breach a contract, the accrual date cannot "be later than the actual breach of the contract by the party who was wrongfully induced to breach." *Trambath*, 43 Cal. App. 3d at 836; *see also San Francisco Unified School Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 1326 (1995) ("once plaintiff has suffered actual and appreciable harm, neither the speculative nor the uncertain character of damages nor the difficulty of proof will toll the period of limitation").

In cases where the Complaint reveals on its face that claims are barred by the applicable statute of limitations, dismissal of those claims is proper under Rule 12(b)(6). *See Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). In this case, the Complaint reveals that, as early as July 5, 1994, Plaintiff was notified that its prospective joint venture with Merkuriy could be in jeopardy due to the involvement of Martin Marietta and Transworld. [Compl. ¶ 20]. Further, the Complaint reveals that, in July 1994, Plaintiff was also aware of Martin Marietta's (and, therefore, Ursini's) potential liability for interference with Plaintiff's prospective business

relationship with Merkuriy. [Compl. ¶ ¶ 21, 25]. Finally, Plaintiff declared, under the penalty of perjury, that its agreement with Merkuriy was breached on August 8, 1994. [See Exh. A. to Lockheed's Request for Judicial Notice, Newkirk Aff., ¶4]. Under the rule in *Trembath, supra*, Plaintiff's causes of action could not have accrued any later than August 8, 1994, the date of the admitted breach, which is addressed in Plaintiff's first claim. Plaintiff's remaining claims similarly could not have accrued at a later date. The alleged wrongful conduct inducing breach of the alleged Semtek/Mer[k]uriy business relationship must have occurred on or before the date that Merkuriy breached its contract which, according to Plaintiff's affidavit, occurred on August 8, 1994.

Plaintiff filed this action on February 26, 1997, over two-and-a half years after the action accrued. Therefore, unless the action was somehow tolled, it is barred by the two-year statute of limitations.

Plaintiff alleges that the two-year limitations period on its causes of action was tolled by Defendants' "fraudulent concealment" of the claim. [Compl. ¶32]. In order to successfully toll the applicable limitations period, Plaintiff must plead "facts showing that [Defendants] actively misled him [and] that he had neither actual nor constructive knowledge of the facts constituting his claim for relief." *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978). Also, Plaintiff "must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Id.* at 250. Further, under Fed. R. Civ. P. 9(b), Plaintiff's allegations of fraud must be pled with particularity.[5]

---

[5] Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." When the requirements of Rule 9(b) are not met, dismissal under Fed. R. Civ. P 12(b)(6) is appropriate. *See Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1986) (failure to meet Rule 9(b) standards makes dismissal under Rule 12(b)(6) proper); *see also Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985) (court may dismiss a claim for failure to comply with Rule 9(b) under Rule 12 (b)(6).

Under all of the standards noted above, Plaintiff's Complaint fails to state a viable basis for tolling of the statute. Specifically, Plaintiff's allegations of fraudulent concealment are contradicted and belied by other allegations in the Complaint. The allegations in Paragraphs 21 and 25 clearly establish that Plaintiff was aware of Defendants' potential liability, and had knowledge of facts sufficient to constitute claims for relief. A vague claim of fraudulent concealment cannot contradict these factual allegations, which are supported by documentary exhibits. Further, Plaintiff's allegations of fraud and misrepresentation are not pled with particularity.[6]

---

[6] The Ninth Circuit has emphasized the need under Rule 9(b) to plead fraud with particularity. In the absence of particularized allegations, a defendant is unable to respond to the charges of fraud. It is precisely this dilemma that Rule 9(b) is intended to remedy. *See Semegen v. Weidner*, 780 F.2d at 731 ("Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.").

In order to adequately plead fraud, a plaintiff must "state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Miscellaneous Service Workers v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981); *accord Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).

Most, if not all of the cases above, were decided under circumstances where fraud was alleged as a separate cause of action in the Complaint. Rule 9(b), however, is not limited to cases where fraud is the independent cause of action. Rather, Rule 9(b) is implicated in "all averments of fraud. . . ." Fed. R. Civ. P. 9(b). Under the Rule 9(b) standard articulated above, Plaintiff has failed to adequately plead facts supporting a tolling of the statute of fraudulent concealment. Further, for reasons noted above, Plaintiff cannot amend the fraudulent concealment allegations because they are contradicted and belied by the documented allegations at Paragraph 21 and 25 of the Complaint.

According to the allegations of Plaintiff's Complaint, the two-year statute of limitations could not have been tolled by fraudulent concealment. The applicable statute of limitations bars this action in its entirety. Accordingly, Defendants' Motions to Dismiss must be DISMISSED WITH PREJUDICE because, given the allegations in the Complaint, amendment would be futile (Plaintiff cannot plead around or contradict its current allegations).

IV. Conclusion

For all these reasons, the Court hereby ORDERS that Defendants' Motions to Dismiss Plaintiff's Complaint are GRANTED. This matter is hereby DISMISSED WITH PREJUDICE.

SO ORDERED.

DATED: May 5, 1997

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Semtek International, Inc.,	)	CASE NO.: CV 97-1580
	)	ABC (RNBx)
Plaintiff,	)	
	)	**JUDGMENT**
vs.	)	
	)	
Lockheed Martin Corp., et al.,	)	
	)	
Defendants.	)	

This action came on for hearing before the Court, Honorable Audrey B. Collins, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Semtek International Incorporated take nothing on its complaint in this action, that the action be dismissed in its entirety on the merits and with prejudice, and that this Judgment be entered forthwith in favor of defendants Lockheed Martin and Samuel Ursini.

DATED: 5/8/97

/s/ Audrey B. Collins
The Honorable Audrey B. Collins
United States District Judge

SUBMITTED BY:

ROBERT E. WILLETT
RICHARD W. BUCKNER
SANDRA R. KLEIN
O'MELVENY & MYERS LLP

By /s/ Richard W. Buckner
Attorneys for Defendants Lockheed
Martin Corporation and Samuel M. Ursini

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Semtek International, Inc.,	)	CASE NO.: CV 97-1580 ABC (RNBx)
Plaintiff,	)	
	)	**Order Re: Lockheed's**
vs.	)	**Motion for**
	)	**Permanent Injunction**
Lockheed Martin Corp., et al.,	)	
	)	
Defendants.	)	

Lockheed's Motion for Permanent Injunction came on regularly for hearing before this Court on August 11, 1997. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that the Motion is DENIED.

I. Procedural Background

On February 26, 1997, Plaintiff SEMTEK INTERNATIONAL, INC. ("Plaintiff") filed a complaint in the Superior Court of the state of California for the county of Los Angeles against Defendants Lockheed MARTIN CORPORATION ("Lockheed"), SAMUEL URSINI ("Ursini"), and DOES 1 through 100. In that complaint, Plaintiff alleged four separate causes of action for: (1) inducing breach of contract; (2) intentional interference with economic advantage; (3) negligent interference with economic advantage; and (4) conspiracy to interfere with prospective economic advantage.

Lockheed first received a copy of the complaint on February 26, 1997. On March 11, 1997, Lockheed removed Plaintiff's action to this Court based on federal diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441(b). At the time of Lockheed's removal, neither Lockheed nor Ursini had been served with the complaint. Plaintiff served the complaint upon Ursini on March 18, 1997, seven days after Lockheed filed its Notice of Removal. On April 11, 1997, Plaintiff filed a Motion to Remand. This Court denied Plaintiff's motion for remand on May 5, 1997. On that same date, the Court also granted Lockheed and Ursini's motion to dismiss under 12(b)(6) on the grounds that all claims stated were barred by California's two-year statute of limitations.[1]

---

[1] In the prior action before this Court, Plaintiff alleged four separate causes of action for : (1) inducing breach of contract; (2) intentional interference with economic advantage; (3) negligent interference with economic advantage; and (4) conspiracy to interfere with prospective economic advantage. In its May 5, 1997 Order, the Court noted that California courts have held that the two-year statute of limitation specified by Cal. Civ. Proc. Code § 339(1) applies to such torts. *See e.g. Trembath v. Digardi*, 43 Cal. App. 3d 834, 836 (1974) (two-year statute of limitations for inducing breach of contract); *Kenworth v. Brown*, 248 Cal. App. 298, 301 (1967) (two-year statute for inducing breach of contract); *McFaddin v. H.S. Crocker Co.*, 219 Cal. App. 2d 585, 591 (1963), *superseded by statute on other grounds as stated in, Levine v. Pollack*, 37 Cal. App. 4th 129 (1995) (two-year statute of limitations for interference with business); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677 (9th Cir. 1980) ("A cause of action for tortious interference with business relationships is governed by the two year statute of limitations.")

For purposes of the Court's statute of limitations analysis, Plaintiff's fourth claim for "civil conspiracy" was not directly considered. In California, there is no separate cause of action for "civil conspiracy." Plaintiff acknowledged this fact. [*See* Opposition to Motion to Dismiss at p. 8]. When a plaintiff has alleged a non-recognized action for "civil conspiracy" to commit a tort, the applicable statute of limitations is governed by the underlying tort without regard to allegations of conspiracy. *See e.g. Agnew v. Parks*, 172 Cal. App. 2d 756, 765 (1959) ("There exist[s] no cause of action for conspiracy in and of itself, [therefore,] the statute of limitations is determined by the nature of the action in which the conspiracy

On June 3, 1997, Plaintiff filed a notice of appeal of this Court's judgment to the Ninth Circuit. On July 2, 1997, Plaintiff filed an action in Maryland state court, entitled *Semtek Int'l Corp., v. Lockheed Martin Corp. & Does 1-100*, (Maryland case"). The Maryland case basically duplicated the factual allegations made in the prior action before this Court. In the Maryland case, however, Plaintiff's claims are subject to Maryland's three-year statute of limitations,[2] as opposed to California's two-year statute.

On July 23, 1997, Lockheed filed the instant Motion for Permanent Injunction under the All Writs Act, 28 U.S.C. § 1651(a). Specifically, Lockheed asserts that it is entitled to an order permanently enjoining Plaintiff from filing or continuing, in any federal or state forum, any action against Lockheed for claims which were adjudicated or could have been raised in the prior action before this Court. Plaintiff responded to the motion by filing its Opposition on July 30, 1997. Defendant filed it Reply on August 4, 1997.

II. Discussion

A. All Writs Act, 28 U.S.C. § 1651(a): Legal Standard

The All Writs Act, 28 U.S.C.§ 1651(a), defines this Court's power to issue injunctions prohibiting the relitigation of claims on which it has reached a judgment on the merits. In pertinent part, the All Writs Act provides that:

> The Supreme Court and all courts established by Act of Congress may issue all

is alleged."]).

[2] *See* Md. Cts. & Jud. Proc. Code Ann. § 5-101 ("A civil action at law shall be filed within three years of the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.")

> writs necessary or appropriate in acid of their respective jurisdictions and agreeable to the usages and principles of law.

[28 U.S.C.§1651(a)]. This language has been construed to vest federal courts with the discretionary power to issue an injunction under the All Writs Act to prevent a party from relitigating an existing federal judgment. *See Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983), *cert denied*, 465 U.S. 1091 (1984); *Clinton v. U.S.*, 297 F.2d 899, 901 (9th Cir. 1961), *cert denied*, 369 U.S. 856 (1962) (affirming injunction prohibiting relitigation of previously adjudicated claims). Even when the underlying case is no longer pending before the Court, it may still exercise jurisdiction over the parties for the purposes of such an injunction.[3] A district court may issue such an injunction, "notwithstanding the fact that the parties to the original action could invoke *res judicata* in state courts against any subsequent suit brought on the same matters." *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985).

However, "[s]ince an injunction preventing the relitigation of claims restricts an individual's access to the court system, it is an extraordinary remedy that should be narrowly tailored and rarely used." *Moy v. U.S.*, 906 F2d. 467, 470 (9th Cir. 1990) (citing to *Wood*, 705 F.2d at 1524-26; *Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984); *In re Packer Ave. Assoc.*, 884 F.2d 745, 747 (3d Cir. 1989)..

Additionally mere litigiousness does not justify issuing an injunction under 28 U.S.C.§1651(a): the "power [to issue an injunction to restrain the filing of meritless pleadings] is to be used sparingly and litigiousness alone will not support its

[3] "A district court retain jurisdiction to enforce judgments it [has] entere[d]." *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1036 (9th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986) (affirming, on *res judicata* grounds, an injunction against future actions) (quoting *Wood*, 705 F.2d at 1524).

invocation." *Winslow v. Romer*, 759 F. Supp. 670 (D. Colo. 1991). Finally, "[t]he issuing of such an injunction should be carefully approached, since access to the Courts is one of the cherished freedoms of our system of government." *Ex Parte Tyler*, 70 F.R.D. 456 (E.D. Mo. 1975).

B. Analysis

Lockheed's request for a permanent injunction is based on three basic contentions:

> (1) that a dismissal with prejudice of an action based solely on the ground that the two-year California statute of limitations has run is a "decision on the merits;"
>
> (2) that a judgment on the merits issued by a District Court precludes any other actions based on similar claims from being brought in other forums with different statutes of limitations; and
>
> (3) that, under the factual circumstances presented by the instant case, a District Court may issue a permanent injunction under the All Writs Act, 28 U.S.C. 1651(a) to prevent a party from relitigating an existing federal judgment.

The Court will address each of these contentions in turn.

1. Preclusive Effect of Federal Diversity Judgment Upon Subsequent State Court Action

Lockheed contends that this Court's dismissal with prejudice of the Plaintiff's action, which was based solely on the two-year California statute of limitations, is a "judgment on the merits" of the action, which would preclude Plaintiff's subsequently-filed Maryland state court action despite the fact

that Maryland's three-year statute of limitations would allow the action. For purposes of Lockheed's requested injunctive relief, the Court does not consider to be obvious that *res judicata* would apply to bar Plaintiff's Maryland state court action.

Lockheed cites to one Ninth Circuit case and one Northern District of California case for the proposition that a judgment dismissing a complaint for failure to state a cause of action based on the statute of limitations grounds is a final judgment on the merits. *See Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1330 n.3 (9th Cir. 1981); *Salveson v. Western States Bankcard Assoc.* 525 F. Supp. 566, 582 (N.D. Cal.1981), *aff'd in relevant part*, 731 F.2d 1423, 1430 (9th Cir. 1984). These cases are the only cases within the Ninth Circuit that support Lockheed's proposition.[4] Both are distinguishable based on the divergent facts presented by the matter at issue here.

In *Ellingson*, the Ninth Circuit opined, in a footnote, that "[a] judgment based on the statute of limitations is 'on the merits.'" *Ellingson*, 653 F.2d at 1330 n.3 (9th Cir. 1981), *citing Mathis v. Laird*, 457 F.2d 926, 927 (5th Cir.), *cert denied*, 409 U.S. 871 (1972). However, the *Ellingson* opinion dealt with two antitrust actions — the first adjudicated in federal district court in Oregon, and the second filed in the Northern District of California. In the prior action, the Oregon district court found that the action was barred by the statute of limitations for federal antitrust actions. In the second action, the California district court found, and the Ninth Circuit affirmed, that a subsequent federal antitrust action based on essentially the same facts was precluded by *res judicata* principles.

Ellingson, therefore, involved preclusion based on the application of a single federal statute of limitations to a subsequent federal antitrust action brought in a second federal court. In contrast, Lockheed's requested injunction in this

---

[4] Of course, the Northern District of California opinion is not binding upon this Court.

matter would entail preclusion based on the application of the California statute of limitations to a subsequent action based on Maryland state law brought in Maryland state court. To make matters more complicated, California and Maryland have divergent limitation periods — Plaintiff's action is time-barred in California, but not in Maryland. In short, the instant matter before this Court does not present the relatively simple factual situation resolved in *Ellingson*.[5]

Salveson was also based on federal antitrust allegations and relied solely upon *Ellingson* for the proposition that a ruling on the statute of limitations "on the merits." Accordingly, *Salveson* is also distinguishable from the present case.[6]

As Lockheed concedes in it Reply,[7] the Ninth Circuit applies the forum state's law to determine the *res judicata* preclusive effect of prior federal diversity jurisdiction. *See Bates v. Union Oil Co. of California*, 944 F.2d 647, 649 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992). Therefore, this Court would have to apply state law in order to determine

---

[5] Furthermore, *Mathis v. Laird* — the case upon which the *Ellingson* [decision] relied in ruling that an application of the statute of limitations is a judgment "on the merits" — is also factually distinguishable. In *Mathis*, an identical statute of limitations applied to both the prior action and the subsequent action. Additionally, the claimant filed both actions in federal court — the first in the Court of Claims, and the second in Federal District Court. Unlike the situation presented by the instant matter, the *Mathis* court found the dismissal based on statute of limitations grounds to be a judgment on the merits in a situation where both actions were adjudicated in federal court and both were subject to the same statute of limitations.

[6] In *Salveson*, although the second action was brought in state court, the federal court allowed removal and dismissed the matter on res judicata grounds because it held that the second action itself was rooted in federal law and was in state court only through artful pleading by the claimants. In contrast, Plaintiff in this case has twice brought purely state law claims in two different state courts. This court allowed removal of the first action based purely upon diversity of citizenship. There was, and is, no federal character to Plaintiff's claims before this Court or the Maryland state court.

[7] *See* Reply at p. 4, n. 5.

whether a ruling on the California statute of limitations would be a judgment on the merits sufficient to preclude a subsequent action in Maryland state court. Both California and Maryland apply federal law to determine the preclusive effect of prior federal judgment. *See Levy v. Cohen*, 19 Cal.3d 165, 172-73 (1977); *Kent v. County Board of Education v. Bilbrough*, 309 Md. 478, 493 (1987).

In support of its argument that federal *res judicata* principles would apply to bar Plaintiff's action in Maryland, Lockheed relies heavily on two cases from outside the Ninth Circuit[8] — *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989) and *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044 (5th Cir. 1989). Both cases, however, are somewhat distinguishable from the facts currently before the Court. For example, in both *Shoup* and *Thompson Trucking*, the respective plaintiffs had statutory time-bar judgments entered against them in one federal district court, and attempted to relitigate the claims in a second federal court.[9] In order to prevent forum-shopping among the various federal districts, both the Fourth and Fifth Circuits held that plaintiffs' subsequent actions were barred.

In the instant case, however, Plaintiff, unlike the plaintiffs in *Shoup* and *Thompson Trucking*, has not purposefully availed itself of a second federal forum.[10] Plaintiff filed both its first and second actions in state courts — California and Maryland,

---

[8] The absence of Ninth Circuit authority addressing the factual and legal circumstances of this case is yet another factor that cautions against this Court's exercise of discretion to grant the requested injunction.

[9] In *Shoup*, the plaintiff filed her second claim in *both* federal and state court. The defendant later removed the state action to federal court and the cases were consolidated.

[10] In fact, Plaintiff never purposefully availed himself of a federal forum at all. In the initial action before this Court, Defendants removed the action, properly, from California state court based on diversity of citizenship.

respectively.[11] Assuming that the Maryland case is remanded to Maryland state court, the *Shoup* and *Thompson Trucking* holdings would not apply. In the Court's opinion, both holdings were animated primarily by an interest in preventing forum-shopping among the federal district courts, which is an unnecessary and wasteful burden upon the federal court system.[12] *See Thompson Trucking*, 870 F. 2d at 1046 (".

---

[11] The Court is informed that Lockheed has removed the Maryland state action to the federal district court in Maryland based on federal question jurisdiction under a somewhat strained interpretation of removal jurisdiction under the All Writs Act and the potential application of federal *res judicata* principles. Lockheed's theory of removal jurisdiction, as the Court understands it, is identical to the theory that was expressly rejected by the Ninth Circuit in *Ultramar v. Dwelle*, 900 F.2d 1412, 1417 (9th Cir. 1980) ("We hold that when the prior federal judgement was grounded in state law, the state claims contained in a subsequent action filed in state court cannot be characterized as federal [based on a potential *res judicata* effect of the prior federal judgment] for purposes of removal."). The determination of removal jurisdiction, however, is properly before the federal district court in Maryland, not this Court.

[12] Both *Shoup* and *Thompson Trucking* were distinguished by the Seventh Circuit in *Reinke v. Boden*, 45 F.3d 166, 171 (7th Cir. 1995) on the following grounds:

> We do not believe that (*Shoup*, *Thompson Trucking*, and other cited cases can control the situation we have before us. These cases involve situations in which the original adjudication as well as the second suit were in a federal district court. Whatever might be the merit of this approach in cases that involve successive suits in the federal courts — and there has been serious criticism — the rationale of these decisions cannot control our case. Unlike any of these cases, we do not have before us two successive federal suits. This difference is not a formalistic one. An intrasystem use of res judicata for dismissals on the ground of expiration of a statute of limitations promotes judicial economy within that system. Therefore, it is in the interest of that system to give res judicata effect to the first judgment. . . . In the context of the intersystem use of res judicata, however, the intent of

> the first forum to save the resources of the second cannot be so readily presumed. The first forum does not share the same interest in restricting the scope of its judgment because any subsequent suit will take place in the forum of another system.

45 F. 3d at 171.

. . the prospect of compelling the already overburdened district courts of the United States to hear the same claims over and over again in different states is, in our view, unappealing.").[13] However, the Fourth and Fifth Circuits do not, and could not, speak to what a state court would do when confronted with facts similar to those presented by this case.[14] Therefore, the determination of whether this Court's dismissal of Plaintiff's initial action, based on California's two-year statute of limitations, operates to preclude Plaintiff's second state-court

---

[13] Ironically, if the federal court system is to be burdened by two successive federal actions in this matter, the burden will be caused by Lockheed's successive removals, not Plaintiff's successive state court complaints.

[14] One could argue, as Plaintiff apparently does, that a state court confronted with a prior federal judgment based solely on the application of another state's statute of limitations would treat the prior federal judgment the same as it would treat a prior judgment of another state. In this event, the Restatement 2d of Judgments and the Restatement 2d of Conflict of Laws counsel that a state court need not afford preclusive effect to a prior statutory time-bar judgment from another state with less lenient statute of limitations. *See* Rest. 2d Judgments, § 19, Comment f; Rest. 2d Conflict of Laws, § 95, Comment c.

One could also argue, as Lockheed apparently does, that the state court would regard the prior federal judgment in the same way that a second federal court would regard it. If so, Fourth and Fifth Circuit authority may counsel the state court to find the second claim barred (the Seventh Circuit may counsel the state to do otherwise).

However, it would be highly ironic if the state court decision to preclude or allow a subsequent action would turn solely upon whether the prior judgment was entered by a federal court sitting in diversity in a given state or by a state court in that same state, both of which apply the same state law.

action in Maryland is properly left to the Maryland state or district court. Because it is unclear where Plaintiff's second lawsuit will be heard, and because the resolution of the *res judicata* issue is far from obvious, the Court declines to determine the issue. As will be seen below, the uncertainties in the proper forum and ultimate resolution of the *res judicata* issue also convince the court that it should decline to exercise its discretion under the All Writs Act.

2. District Court Discretion under the All Writs Act

Lockheed contends that this Court *may* issue a permanent injunction under the All Writs Act to prevent Plaintiff from relitigating an existing federal judgment. As a general proposition of law, the Court agrees with Lockheed's contention. However, the proposition that the Court *may* grant permanent injunctive relief under the All Writs Act in an appropriate case does not command that the Court *must* grant Lockheed the relief it seeks in this case.

The federal courts' power under 28 U.S.C. 1651(a) to issue injunctions against repetitive litigation is completely discretionary. Moreover, as noted above, this discretion should be exercised with a particularly high level of caution.

In the matter at bar, Plaintiff has filed only one subsequent action against Lockheed — the Maryland case. Besides the filing in Maryland, Lockheed has not shown evidence of any intention on the part of Plaintiff to perpetually relitigate its claims in all other available forums. Further, Lockheed has offered no evidence that Plaintiff's action could potentially be brought in any fora besides California and Maryland.[15]

---

[15] Any actions filed subsequently by Plaintiff would be clearly barred by statute of limitations of three years or less. Lockheed has not provided evidence to the Court of any jurisdiction, with proper venue, where a subsequently-filed action would not be time-barred.

Additionally, legal remedies other than the extraordinary remedy of permanent injunctive relief are available to Lockheed.[16] Lockheed's argument that the doctrine of *res judicata* bars the Maryland case may be brought before the proper court in a motion to dismiss or motion for summary judgment based on *res judicata* preclusion. As the Court concluded in its discussion above, that matter can properly be decided by the appropriate court in Maryland, not by this Court.[17]

Further, this Court is not convinced that the single action filed by Plaintiff in Maryland rises to the level of vexatious relitigation which would warrant use of the rather extreme remedy that Lockheed requests. Plaintiff has not filed subsequent actions that are either "numerous" or "patently without merit." *See In re Oliver*, 682 F.2d 443, 446 (3d Cir. 1982). The Court does not view this chronology as one in which the Court is justified in summarily precluding Plaintiff's access to the courts. This Court's prior order did not reach the substantive merits of Plaintiff's tort claims. If another proper forum will afford Plaintiff the opportunity to fully litigate the merits of its causes of action, without applying a statutory or *res judicata* bar, the Court does not find it appropriate to bar Plaintiff from proceeding in that forum. Accordingly, the Court declines to exercise its discretion under the All Writs Act, 28

---

[16] In the Ninth Circuit, the basis for injunctive relief includes "inadequacy of legal remedies." *Sierra Club v. Penfold* 857 F.2d 1307, 1318 (9th Cir. 1988).

[17] Additionally, for reasons noted above in Section II(B)(1), it is not obvious to this Court that *res judicata* applies to bar Plaintiff's action in Maryland state court. Further, the Court is not convinced that the matter is properly removable to Maryland federal district court. However, the Court must reiterate that these issues are properly decided by the proper court in Maryland, and any dicta or other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of the issues of removal jurisdiction and *res judicata* preclusion.

U.S.C. 1651(a) and DENIES Lockheed's Motion for Permanent Injunction.

III. Conclusion

For all the reasons set forth above, the Court hereby ORDERS that Lockheed's motion for a permanent injunction prohibiting Plaintiff from filing any actions in any other fora based on the claims litigated in this Court is DENIED.

SO ORDERED.

DATED: August 11, 1997

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE